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BRIEF FOR CERTIORARI.

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In the Supreme Court of the United States.

Filed Feb. 6, 1900.

OCTOBER TERM, 1899.

FRED A. McMASTER, ADMINISTRATOR,

Petitioner,

vs.

NEW YORK LIFE INSURANCE CO.,

Respondent.

BRIEF IN SUPPORT OF THE PETITION FOR THE WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

HENRY J. TAYLOR, SIOUX CITY, IOWA,
FRANK E. GILL, SIOUX CITY, IOWA,
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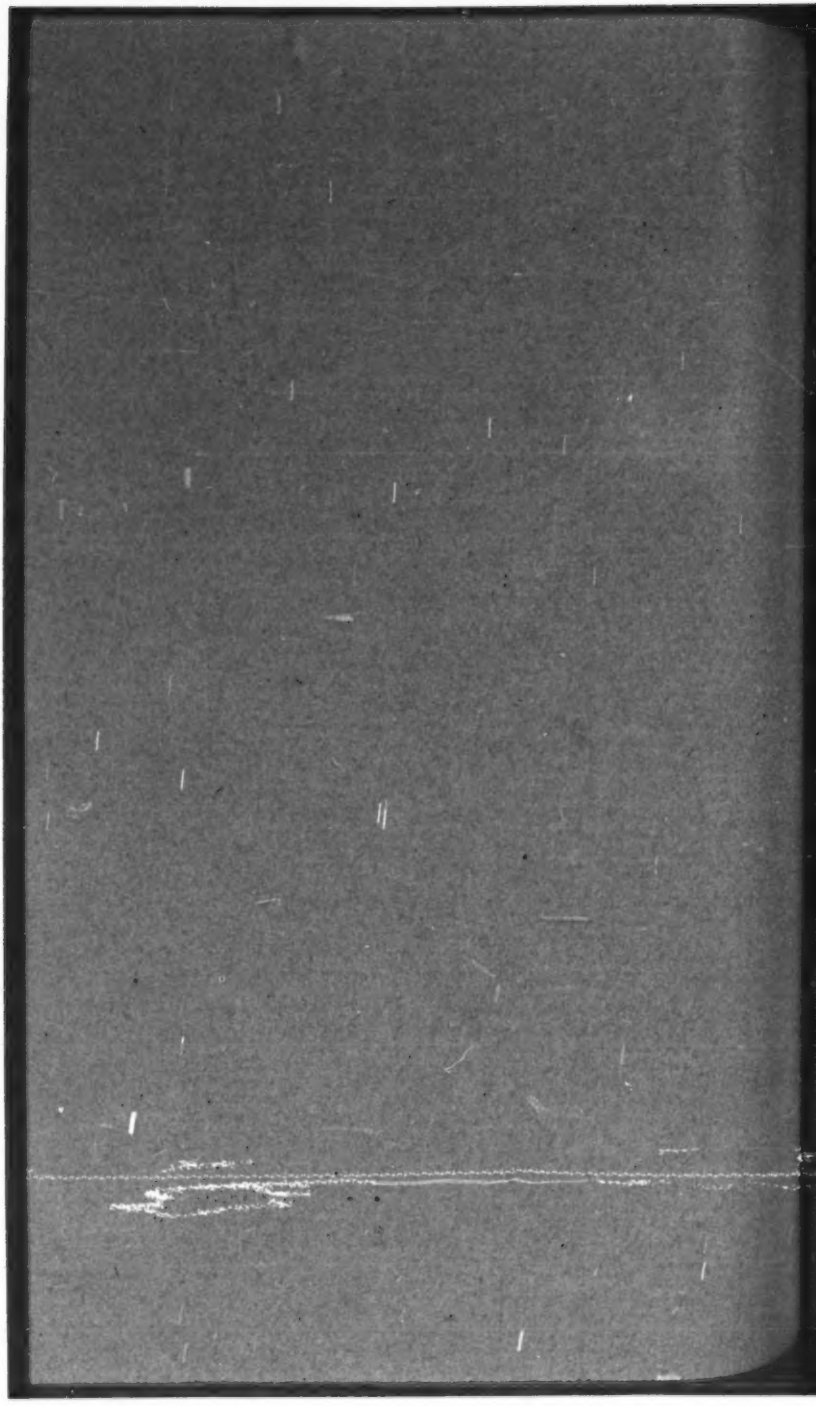
Solicitors and of Counsel for Petitioner.



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The divisions of this brief correspond to the divisions of the petition. The brief is designed to supplement rather than to re-state the grounds of the petition.

I.

The petitioner deems the statement of his case in the petition as sufficient for the proper understanding of this brief.

II.

The petitioner assumes that this Court will read the opinions of the several judges who have heard this case. The petitioner adopts the opinions of Judges Shiras and Caldwell as his own statement and argument in support of the petition for the writ of certiorari.

Judge Shiras' opinion is found on pp. 35-52 of the Record.

Judge Sanborn's opinion is found on pp. 71-83 of the Record.

Judge Thayer's opinion is found on pp. 83-4 of the Record.

Judge Caldwell's opinion is found on pp. 84-101 of the Record.

A former opinion of Judge Shiras is printed as an appendix to this brief. As that opinion was written in the equity case between these parties (78 Fed. Rep., 33) we feel warranted in printing it and in asking this Court to read it.

III.

THE SPECIAL FINDING AS TO NOTICE IS INSUFFICIENT TO AUTHORIZE THE JUDGMENT OR TO SUSTAIN THE SAME ON APPEAL.

The special findings of the Circuit Court must be accepted on appeal as of absolute verity.

The failure of the Circuit Court to find an essential fact, or the insufficient or imperfect finding of any fact essential to support the judgment, is fatal to the judgment.

A statement of the legal effect of a document not in the record, nor made a part of the findings, nor its contents anywhere set out or disclosed, is not a finding of fact, but a mere conclusion of law, and is of no force.

The respondent sought to forfeit the policies by giving a notice in deference to the New York statute of forfeiture.

The application declares this insurance contract to be a New York contract (p. 12). The policies refer expressly to this New York statute as Chapter 690, Laws of 1892, of the State of New York (p. 10), and are made payable, in case of loss, in New York State (p. 6), and were there advised, issued and dated, and there proofs of death were to be made (pp. 6, 9). The application is expressly made a part of the policies (Div. 5, p. 12), and it is expressly provided therein "that the contract contained in said policy and in this application, shall be construed according to the laws of the State of New York, the place of said

contract being agreed to be the home office of said company in the city of New York" (p. 12).

The New York statute in force at the time these policies were issued declares:

"No Forfeiture of Policy Without Notice. No life insurance corporation doing business in this state shall declare forfeited, or lapsed, any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited, or lapsed, by reason of non-payment, when due, of any premium, interest, or installment or any portion thereof, required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, installment, or portion thereof, due on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known post-office address, postage paid by the corporation, or by an officer thereof, or person appointed by it to collect such premium, at least fifteen, and not more than forty-five days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment, or portion thereof, then due, shall be paid to the corporation, or to a duly appointed agent or person authorized to collect such premium, by or before the day it falls due, the policy, and all payments thereon, will become forfeited and void, except as to the right to a surrender value, or paid up policy, as in this chapter provided. If the payment demanded by such notice shall be made within the time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section has been

duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given." Laws 1892, C. 690, art. 1, par. 92.

The burden of proof to show that a legal and sufficient notice was properly given rests upon the insurance company. It must show strict compliance with the terms of the statute before it can assert a forfeiture. The requirements of this statute, and each of them, are rigidly enforced under plain, definite and exacting decisions of the Court of Appeals of the State of New York which are adopted in the Federal Courts.

Baxter v. *Insurance Co.*, 119 N. Y., 454, holds that:

"This statute was a part of the contract in question, and governs the rights and liabilities of the parties in precisely the same way and to the same extent as if all its terms and conditions had been actually incorporated into the policy."

See also *Defrece* v. *Insurance Co.*, 136 N. Y., 151.
Phelan v. *Insurance Co.*, 133 N. Y., 147.
Griffith v. *Insurance Co.*, 101 Cal., 627.
Johnson v. *N. Y. Life Ins.*, 78 N. W. R., (Ia.), 905.
N. Y. Life Ins. Co., v. *Dingley*, (C. C. A., 9th Circuit), 93 Fed. Rep., 153.
Rosenplanter v. *Prov. Sav. Life Assr. Soc.*, (C. C. A., 6th Circuit), 96 Fed. Rep., 721.

The only finding of fact on the question of notice, reads as follows:

"10th. That not later than November 17th, 1894, notice was sent to Frank E. McMaster of the coming due of the premiums on the policies issued to him by the defendant company, in accordance with the requirements of the statutes of the State of New York."

There is an utter failure to find any of the requisite facts showing a compliance with the New York statute by the company. The statute requires that the notice shall be mailed "at least fifteen, and not more than forty-five days, prior to the day when the same (premium) is payable."

The general statement that a notice was sent not "later than November 17, 1894," is not the finding of an ultimate fact. It is not a finding that the notice was not sent more than forty-five days prior to the day when the premium was payable. The notice might have been sent sixty days prior thereto, and still the finding would be absolutely true; yet the plain requirements of the statute would not be satisfied.

The statute requires that the notice "shall be duly addressed and mailed to the person whose life is insured." For anything that appears the notice may have been sent to Alaska, unaddressed and by a private messenger.

There is no finding that the letter was properly addressed or mailed to the assured "at his last known post-office address, postage paid."

The finding does not show, as the statute requires, that a written or printed notice was given stating the amount of the premiums due on the policies; the place where and the person to whom the premiums should be paid; nor that the notice was sent to the assured properly addressed, prepaid and mailed within the period of time required by the statute; nor that a notice was sent notifying the assured when the premiums would become due and payable; nor that unless the premiums were paid the

policies and all payments thereon would become forfeited and void as provided by the statute.

The only finding that even attempts to satisfy the requirements of the New York statute, is the latter part of this 10th finding: that a notice was sent "in accordance with the requirements of the statute of the state of New York."

But this clause must be construed in reference to and limited by the finding that the notice was "of the coming due of the premiums on the policies" in controversy, and such a restricted notice is wholly insufficient and fatal, for it omits a dozen other equally essential requisites, even if sent "in accordance with the requirements of the statutes of New York," as to this one particular. In assuming to state one of the terms of the notice, the finding should be held to exclude others not mentioned. If the finding should be held to refer to the notice set out in the answer (p. 20, par. 4), then the notice given was fatally defective.

Inasmuch as none of the essential contents of the notice are found, nor anywhere given, the last clause of the 10th finding is without force or effect to sustain the judgment, because it states a mere conclusion of law, and not the finding of an ultimate fact. The general statement that a notice was sent "of the coming due of the premiums" at some unstated time does not sufficiently state the ultimate fact.

U. S. v. *Harris*, 77 Fed. Rep., 825.
Cooper v. *French*, 52 Ia., 531.
12 Ency. Pl. & Pr., pp. 1038-1046.
Daube v. *Phil. Ry. Co.*, 77 Fed. Rep., 715-6.

"Findings of fact which merely announce certain legal conclusions deducible from facts not stated are not sufficient to support a judgment."

8 Ency. Pl. & Pr., 943.
Kane v. *Rippey*, 22 Ore., 299.

The burden of proving a strict compliance with all the essential requirements of the statute being upon the insurance company, and the special findings being silent as to every essential fact of notice, the Court is bound to infer an insufficient notice, for nothing can be supplied to such findings by intendment. Every essential fact to support the judgment must affirmatively appear in the findings.

U. S. v. *Harris*, 77 Fed. Rep., 821, 825.

See the dissenting opinion of Judge Caldwell, p. 101 of the Record.

IV.

THE CASE WAS TURNED ON THE RULE OF PAROL EVIDENCE. IT SHOULD HAVE TURNED ON THE DOCTRINE OF EQUITABLE ESTOPPEL.

Judge Sanborn says:

"This is another attempt to cause prior and contemporaneous parol statements of the terms and legal effect of written agreements to prevail over the plain stipulations of the writings themselves."

Not at all. Judge Sanborn, we submit, has entirely missed the point and distinction contended for. He confounds the rule that a written contract cannot be changed by parol evidence with the doctrine of equitable estoppel.

Everything that Judge Sanborn says may be conceded to be true, and still a recovery be had upon the policies in controversy by the application of the doctrine of waiver or equitable estoppel.

The insurance company by its conduct has estopped itself from insisting that the policies delivered gave less than thirteen months of insurance for the first annual premium, because to do so would result in the perpetration of a legal fraud. This does not involve any inconsistency between the parol evidence rule and the doctrine of equitable estoppel; but if it does, then the former must give way to the latter. The parol evidence rule is itself not a rule of evidence. It is rather an inhibition against evidence, for various reasons, chief among which is that solemn writings are more trustworthy than memory, all in the interest of ascertaining and enforcing justice and honesty.

The parol evidence rule, however, is not the only rule that Courts have recognized or permitted to control. The doctrine of estoppel is perhaps the greatest legal principle of modern times in its elasticity and efficiency to prevent the perpetration of wrong. If a writing dominated by the parol evidence rule has been procured through fraud, deceit, overreaching, or in any way that puts fair play and honest dealing to shame as a matter of intention or ultimate result, then the sanctity of the written instrument is removed, and the party claiming under it is disabled to so use it as to impose a loss or hardship upon the party overreached or to consummate a fraud. The doctrine of estoppel then steps in with a voice of supreme authority and declares that the written instrument has forfeited its right to invoke the parol evidence rule, be-

cause procured through mistake, fraud or deceit, things that cannot be tolerated in a court of justice.

To put it another way, a writing can never insist on the parol evidence rule unless it is a writing of good, equitable reputation. If it is shown to be a fraud and a cheat, its right to command must cease, and its voice must be silenced by the supreme doctrine of equitable estoppel, which brooks no opposition to its purpose of rendering fraud ineffectual.

This is the contention of Judges Caldwell and Shiras.

We concur with Judge Caldwell, who, in righteous indignation, says: "Not one case cited by the majority is an authority *on the facts of this case.*"

If the written agreements in controversy do not permit thirteen full months of insurance for the first full annual premium then these agreements have so bad a reputation that the application of the doctrine of equitable estoppel becomes controlling, and must abrogate the parol evidence rule.

It is conceded that the month of grace (p. 9) in connection with the application procured the agreement for thirteen months' insurance. (Findings 3, 4, 7, 8, 9, 12, 13 and 14, pp. 32-35.)

This Court has said (*Ins. Co.* v. *Hearne*, 20 Wall., 490) that he (the assured) "had a right to assume that the policy would accurately conform to the agreements thus made, and *to rest confidently in that belief.*"

Judge Sanborn admits that the policy in controversy is a "counter proposition" upon the one controlling representation that induced the insurance, and that it grants

insurance, not for thirteen months, as was admittedly agreed, but for only twelve months and seventeen days. In other words, that the "counter proposition" deprives the assured of nearly one-half of the extra month of grace feature, which was successfully heralded by the agent, and "by circulars issued by the company" (3d finding, p. 22), and by provisions printed on the back of the policy itself.

Conceding for the purpose of this argument that the policy does not grant thirteen months of insurance, the agent knew this. To have delivered such a "counter proposition" without advising the assured that there was a counter proposition would have amounted to fraudulent concealment. But that is not the case. The assured was prevented from reading the policies by the agent's statement of their terms, and trusted to the honesty of the insurance company by asking whether the policies were as represented, and the company responded, "yes." To make sure that the vital inducement had not been overlooked, he further crowded the inquiry and asked if they (the policies) did insure him for the period of thirteen months, to which the agent replied that they did so insure him, and, thereupon, in reliance upon these representations of the company as to existing facts concerning the completed policies, accepted them, placed them away unread before the eyes of the agent, who there and then reached out his hand and received "the full first annual premium, or the sum of $21 on each policy" (9th finding, pp. 33-4), and went his way rejoicing in the security of his "bonus" (6th finding, pp. 32-3).

But the record shows more than "a counter proposition." It shows a contemptible fraud, the fruits of which

the company strives to secure under the parol evidence rule, and the petitioner, as his last and only recourse, asks this Court to take his case and prevent iniquity by enforcing an estoppel in pais.

Judge Thayer in his concurring opinion assumes that the representations of the agent to be material had to be made with intent to deceive or mislead. But neither a fraudulent purpose nor an intent to deceive or mislead is essential to the application of the doctrine of equitable estoppel.

Leather Manufacturers Nat'l Bank v. *Morgan*, 117 U. S., 96.
Dickerson v. *Colgrove*, 100 U. S., 580.
2 Pomeroy Eq. Jur., Sec. 805.
Dair v. *United States*, 16 Wall., 1-4.

See also petition for rehearing, Record, pp. 113-17.

It is always enough if the conduct or representations naturally result in accomplishing a legal fraud.

"It has long been held that where it is a breach of good faith to allow the truth to be shown, there an admission will estop."

Bank v. *Morgan*, 117 U. S., 96.

The doctrine of equitable estoppel may be applied in a law action.

Barnard v. *German American Seminary*, 49 Mich., 444.
Kirk v. *Hamilton*, 102 U. S , 777.
John Shilleto Co. v. *M'Clung*, 45 Fed., 778.
Ins. Co. v. *Wilkinson*, 13 Wall., 222.

In this case the insurance agent represented the respondent, New York Life Insurance Company, "anything in the application or policy to the contrary notwithstanding," and his statements and agreements are the statements and agreements of the company itself.

Assurance Soc. v. *Clements*, 140 U. S., 226.
Indemnity Company v. *Berry*, 1 C. C. A., 561.
Cook v. *Association*, 74 Iowa, 746.
Continental Life Ins. Co. v. *Chamberlain*, 132 U. S., 304.
N. Y. Life Ins. Co. v. *Russell*, 77 Fed. Rep., 94.
Washington Central Bank v. *Hume*, 128 U. S., 195, 206.
Joyce on Insurance, Sec. 194.

Broader than the rule of parol evidence against varying or contradicting the writing, is the doctrine that one cannot use an instrument procured through mistake, fraud or deceit to perpetuate the same. The assured never assented to this unknown, unsuspected, undisclosed and concealed "counter proposition."

Union Ins. Co. v. *Wilkinson*, 13 Wall., 222, 236.
Continental Life Ins. Co. v. *Chamberlain*, 132 U. S., 304.
Phœnix Ins. Co. v. *Allen*, 109 Ind., 273.
Plumb v. *Insurance Company*, 18 N. Y., 392.
Howe v. *Provident Soc.*, 34 N. E. R., 830, 1-2.
Insurance Company v. *Leon*, 37 N. E. R., 584.
Sullivan v. *Insurance Company*, 34 Kan., 170.

"The written instrument does not always represent the intention of both parties, and sometimes it fails to do so as to either; and where this has been the result of accident, or mistake, or fraud, the principle has been long

recognized that under proper circumstances, and in an appropriate proceeding, the instrument may be set aside or reformed, as best suits the purposes of justice. A rule of evidence adopted by the courts as a protection against fraud and false swearing would, as was said in regard to the analogous rule known as the statute of frauds, become the instrument of the very fraud it was intended to prevent, if there did not exist some authority to correct the universality of its application. * * * It is in precisely such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppels, or, as it is sometimes called, estoppels in pais. The principle is that where one party has by his representations or his conduct induced the other party to a transaction to give him an advantage which it would be against equity and good conscience for him to assert, he would not in a court of justice be permitted to avail himself of that advantage. And although the cases to which this principle is to be applied are not as well defined as could be wished, the general doctrine is well understood and is applied by courts of law as well as equity where the technical advantage thus obtained is set up and relied on to defeat the ends of justice or establish a dishonest claim."

Union Ins. Co. v. *Wilkinson*, 13 Wall., 222, 236.

V.

THE DECISIONS OF THE SEVERAL UNITED STATES CIRCUIT COURTS OF APPEALS UPON THE PROPOSITIONS OF LAW PRESENTED BY THIS CASE ARE NOT UNIFORM, AND IN THE INTEREST OF JURISPRUDENCE THE WRIT SHOULD ISSUE FOR THE SAKE OF UNIFORMITY OF DECISION, APART FROM THE QUESTION THAT THE MATTER IS OF SUFFICIENT IMPORTANCE IN ITSELF TO INVOKE THE WRIT.

The case of *McElroy* v. *British America Ins. Co.*, 94 Fed. Rep., 990, 1000, would manifestly sustain a recovery in

this case. In that case the Circuit Court of Appeals for the Ninth Circuit considered the questions presented in this case on reason and authority, and used these words:

"It would certainly have been an act of prudence on his part to read the entire policy, but his neglect to do so cannot excuse the company for the default of the agent in not writing the contract in accordance with the representations made by the insured. The insured had a right to rely upon the agent's performing his duty of making the contract in conformity with the information given; and the agent's failure to do so, whether the result of a mistake or of a deliberate fraud, cannot operate to the prejudice of the insured. The contract of insurance is preeminently one that should be characterized by the utmost good faith on both sides."

So the Circuit Court of Appeals for the Sixth Circuit considered the questions in the case of *London & L. Fire Ins. Co.* v. *Fischer*, 92 Fed., 500, 34 C. C. A., 503, and its decision would also authorize a recovery upon the policies in controversy.

Indeed, Judge Caldwell, in his dissenting opinion, page 99, contends that the decision in this case is "diametrically opposed" to the case of *Fireman's Fund Ins. Co.* v. *Norwood*, 16 C. C. A., 136, 69 Fed. Rep., 71, of the Circuit Court of Appeals for the Eighth Circuit, as well as contrary to the *McElroy* case in the Ninth Circuit, and the *Fischer* case in the Sixth Circuit, supra.

The decisions of the state courts with substantial uniformity would permit a recovery on the policies in controversy.

VI.

IT IS UNCONTRADICTED THAT THE GRIEF OF THIS CONTROVERSY WAS WROUGHT WITHOUT THE KNOWLEDGE OR CONSENT OF THE INSURED BY REASON OF THE WRONGFUL INTERPOLATION IN THE APPLICATION BY THE AGENT OF THE INSURANCE COMPANY OF THE WORDS, "PLEASE DATE POLICY SAME AS APPLICATION." (6TH FINDING, P. 32). THIS WAS DONE "BY THE AGENT IN ORDER TO SECURE TO THE AGENT A BONUS WHICH THE COMPANY ALLOWED TO AGENTS FOR BUSINESS SECURED DURING THE MONTH OF DECEMBER, 1893."

The application was dated December 12th (p. 12). The policy was issued and dated in New York City December 18th (p. 6). The application, as well as the agreements, expressly provide (Div. 4, p. 12): "That any policy which may be issued under this application shall not be in force until the actual payment to and acceptance of the premium by said company." The policies were delivered and the premiums paid in Sioux City, Iowa, on December 26.

It is also uncontradicted that the assured under the agreement was to have thirteen full months of insurance for the first annual premium. The insurance company read the illegal interlineation, "please date policy same as application" (p. 11), and, notwithstanding the provision that the policies should not be in force until their delivery and the payment and acceptance of the first premium, made the second annual premium payable on December 12th, the date of the application, although the policies were not delivered or paid for, or in force until December 26th, and were not written up or issued or dated until

December 18th. Had the second annual premium been made payable on December 18th, the right to recover would have been conceded without litigation.

The Circuit Court found:

"Relying on the benefits of this provision and in the belief that if he accepted a policy of insurance upon his life, from the New York Life Insurance Company, paying the premiums thereon annually, the company could not assert the right of forfeiture until thirteen months had elapsed, since the last payment of the annual premium, the said Frank E. McMaster signed an application for insurance in said company, dated December 12, 1893, of the form which is made part of the policies sued on and attached to the petition, the same being made part of this finding of facts." (4th finding.)

"The five policies enclosed in envelopes on or about December 26th, 1893, were taken by F. W. Smith, the agent of the defendant company to the office of Frank E. McMaster, who asked the agent if the policies were as represented, and if they would insure him for the period of thirteen months, to which the agent replied that they did so insure him, and thereupon McMaster paid the agent the full first annual premium, or the sum of twenty-one dollars, on each policy, and without reading the policies he received them and placed them away.

"The agent did not in any way attempt to prevent McMaster from reading the policies, and he had the full opportunity for reading them, but in fact did not read them, and accepted them on the statement of the agent of the company, as hereinabove set forth." (9th finding.)

Judge Sanborn, p. 79, admits that the policies were not responsive to the applications. He says:

"The applications were nothing but a proposition to take insurance. They were not contracts, but mere requests for, or a proposition to take, policies. The company was not bound to grant these requests or to accept the proposition. It had the right to reject them *in toto* or to reject some parts of them and to make a *counter*

proposition. It took the latter course. *It rejected some parts of the applicant's proposition and made a counter proposition.*"

The policy by its terms makes the application a part of the contract (p. 6).

Thirteen full months of actual insurance for the first premium, as represented by the company in its printed circulars and by its agent, was the dominant and controlling inducement to the contract of insurance. It was, therefore, dishonest and fraudulent to present a counter proposition which eliminated the sole inducement to the contract, without even advising the assured that the policies contained a "counter proposition." It was doubly dishonest for the company, through its agent, to stand up and in the face of the assured, in response to his exacting and searching inquiries, proclaim as strong as language is capable of putting it, that the policies contained no counter proposition, but by their terms furnished thirteen months of insurance for the first premium, and were in all respects as represented, intending and knowing that its representations of existing facts at the moment of delivery, in the midst of an interruption, induced the immediate payment of the full first annual premium, put the assured off his guard, and induced him to put the policies away unread.

"Counter proposition" is a mere term, but even that could not be sanctioned under a delivery of the policies in silence, and much less under a delivery accompanied by false representations of existing facts as disclosed in this controversy.

In *Equitable Ins. Co.* v. *Hearne*, 20 Wall., 494, this Court said:

"The policy was intended to put the contract in a more full and formal shape. The assured was bound to read the letters of the company in reply to his own with care. It is to be presumed he did so. He had a right to assume that the policy would accurately conform to the agreement thus made, and to rest confidently in that belief."

The opinion of Judge Caldwell upon this proposition is so elaborate and convincing that we again secure brevity in this brief by adopting his arguments.

VII.

A REASONABLE CONSTRUCTION OF THE POLICIES WOULD PERMIT A RECOVERY TO BE HAD UPON THEM.

The two opinions of Judge Shiras, appendix to this brief, and pp. 35-56 of the Record, as a matter of construction, establish the ambiguity of the written agreements, and demonstrate that the provisions of the written agreements of the parties, if properly construed, grant thirteen months' insurance for the "first full annual premium."

The application that is made a part of the policy, and preceded it in time, restates the agreement of the parties on the point (Div. 4, p. 12): "that any policy which may

be issued under this application shall not be in force until the actual payment to, and acceptance of the premium, by the company." It necessarily follows, therefore, that the contract of insurance went into effect only on delivery of the policies and the payment of the premiums therefor, to-wit : on December 26, 1893. But the company exacted "the full first annual premium, or the sum of $21 on each policy" (9th finding, p. 33). On the face of the policy, in conspicuous location, are the words "annual premium, $21" (p. 6). The assured, therefore, bought and paid for a full year's insurance from December 26, 1893, to which must be added the special inducement of an extra month of grace (p. 9), which admittedly was a special feature of this company's policies, that both attracted and secured the insurance in controversy.

The date or payment of the second annual premium may possibly have some force in connection with insurance for subsequent years, but was never intended, and ought not to be permitted, to chop off thirteen days' insurance, for which the company received, and still retains, payment. Unquestionably the assured bought thirteen months' insurance for $105. The provision that the policy should not go into effect until it was delivered and paid for was material, and would have been asserted by the company if necessary. That provision, if inconsistent with other provisions in the policy, is still a part of the policy, because the application is expressly so made, and preceded the policy in time, and should be held to control in respect of the understanding of the amount

of insurance secured to the assured for "the full first premium."

Whether the right to continue the policy in force for subsequent years became fixed by the date, December 12th, on the face of the policy, is immaterial, but the company ought not to be permitted to use that date to reduce the period of insurance for which it received, and still retains, the assured's money. The assured was entitled to the insurance *already paid for*, to-wit: thirteen months of insurance, whether he made the second annual premium payment on the 12th of December or not. It is an unjust and unreasonable construction to say that the company intended to grant the assured thirteen months' insurance and received full payment therefor by the payment of the full first annual premium, and then adroitly worded its policy in such a way that the assured could not get thirteen months of insurance for the full first annual premium, but must also pay the full second annual premium in order to get that which the company evidently contemplated he should receive without the payment of the second annual premium.

The month of grace is a whole month. No construction is reasonable that takes away thirteen days of the month of grace. Either there is a whole month of grace or there is no grace at all. That appears to be self evident. The company and the assured agreed that there should be no insurance from the date of the application, December 12th, to the date of the delivery of the policy, and the payment therefor, December 26th. It is so nominated in the bond (Div. 4, p. 12), and the same is made a part of the policy (Div. 5, p. 12). The company was not entitled,

therefore, to payment for this period of non-insurance, and, inasmuch as it clearly stipulated in writing when the policy should go into force, that stipulation should be made effective; and as the company collected and received "the full first annual premiums," it should be held to have sold the assured that which he bought and paid for, namely, a full year's insurance, plus the additional month of grace.

If the *second* annual premium had been made payable on the date corresponding to the date of the policy, December 18th, then this controversy would never have arisen.

Packhill v. *Brighton*, 61 Iowa, 103.
Iowa Code of '97, Sec. 23, p. 125.
Sec. 26, Chap. 677, New York Laws, 1892.

The clause, "if any premium is not thus paid on or before the day when due, then (except as hereinafter otherwise provided) this policy shall become void, and all payments previously made shall remain the property of the company," contravenes the New York statute and is void. The New York statute fixes the only possible grounds or manner under which a forfeiture may be successfully declared and enforced. It is not within the power of the parties to add to, limit or set aside the paramount provisions of the statute. This clause, therefore, in the policy, as construed by the Circuit Court of Appeals, should be held null and void.

Hurst Home Ins. Co. v. *Muir*, (Ky.) 53 S. W. R., 3.

VIII.

THE "DUE DATE" IS AMBIGUOUS, INDEFINITE AND ELASTIC, AND THE ALLOWANCE OF 13 MONTHS' INSURANCE FOR THE FIRST FULL PREMIUM DOES NOT VARY THE TERMS OF THE POLICIES.

The opinion in *Baxter* v. *Brooklyn Life Ins. Co.*, 119 N. Y., 454, holds that the due date is not fixed by the nominal date of premium payment on the face of the policy, but by the expiration of thirty days after giving the statutory notice. And the dissenting opinion in that case emphasizes the holding of the majority to be that "the premium does not become due until after notice and expiration of the thirty days." The due date, therefore, of the premium, under the *Baxter* case, *supra*, is fixed by the New York statute, and not by the face of the policy, and may be postponed beyond the policy date of December 12th, simply by delay in giving the statutory notice. The company had a leeway in the giving of this notice of at least thirty days, and, therefore, was able to extend the due date without violating the terms of any agreement whatever, and at the same time fulfill its promises and representations, because the due date is determined by the New York statute, and is made to depend upon the giving of the notice. The time when the notice shall be given, or, indeed, the fact of giving any notice at all, finds no expression in the agreements of the parties; nor would delay enough in giving the notice to keep good the promise of the company, run against the rule of parol evidence.

This point is more fully argued in the petition for rehearing, pp. 121-8 of this Record.

When policies of insurance contain contradictory, conflicting or inconsistent provisions, effect will be given to the provisions most favorable to the insured, and that construction will be adopted which is most favorable to the insured.

National Bank v. *Insurance Co.*, 95 U. S, 673.
Grace v. *American Central Ins. Co.*, 109 U. S., 278.
Moulor v. *American Life Ins. Co.*, 111 U. S., 335.
American Surety Co. v. *Pauly*, 170 U. S., 133.
Travellers' Ins. Co. v. *McConkey*,
127 U. S., 661, 666.
Thompson v. *Phenix Ins. Co.*, 136 U. S., 287, 297.
Imperial Fire Ins. Co. Coss County,
151 U. S., 452, 462.
Indemnity Co. v. *Dorgan*, 16 U. S. App., 290, 309;
7 C. C. A., 581; 58 Fed. Rep., 945.
Insurance Co. v. *Randolph*, 24 C. C. A., 305; 78
Fed. Rep., 754, 761, 762.

Under rules of proper construction, these policies should be construed to grant thirteen full months of insurance for the payment of the first annual premiums. This argument is elaborated by Judge Shiras (Rec., pp. 35-52) in such a lucid and masterly manner that we hesitate in doing more in this brief than merely suggesting the point to the Court.

The month of grace (p. 9; par. 2, p. 20) is an admitted extra month that went to make up the thirteen months' insurance, so we may lay aside that month as a benefit secured and conceded.

The right to continue the policy under renewals was not discussed. But the right to thirteen full months of insurance for the first annual premium was reiterated as

the controlling inducement for the insurance. The agreements in controversy should admit of a construction that would grant a full year's insurance for the first annual premium, plus an additional month of grace, regardless of the question of future insurance. The month of grace is always to be considered as an indulgence or security, as a gratuity (p. 20). It is admitted that the company was paid and retains the price of thirteen months' insurance, and that if this judgment shall stand the insured will be cheated out of thirteen days. The forfeiting provisions should be construed as effecting the rights of renewals, that is, as effecting a continuation of the policies in force in subsequent years, and not as a limitation upon the time for which the premium had already been paid. Having paid for thirteen months' insurance the assured should not be subjected to a forfeiture which in effect partly forfeits the payment already made.

"It is claimed that the policy was forfeited *eo instanti* upon October 30, 1895, because the second quarterly premium was not paid upon that date. This contention is based upon a clause of the policy which declares that this policy "shall be *ipso facto* null and void if premiums are not paid when due." The construction of the policy here contended for would recognize and approve a harsh doctrine indeed. It would be carrying the doctrine of forfeiture to unconscionable lengths. By payment of the first quarterly premium, the deceased was insured for three months. This was necessarily the contract between the parties. This clause of forfeiture for nonpayment of premiums was never intended to forfeit the privileges of insurance already paid for. No insurance policy ever attempted to do such a thing. This contention, if sound, would not only result in the forfeiture of present paid-up insurance, but would result in the forfeiture of a portion of the premium already paid."

Methvin v. *Fid. Mut. Life Ass'n*, 58 Pac. Rep., 387.

IX.

THE CONTROVERTED PROVISIONS OF THE POLICIES ARE DIFFICULT OF INTERPRETATION, UNCERTAIN AND AMBIGUOUS.

Upon this proposition, we would ask the Court to carefully consider the cases cited by Judge Caldwell, and especially *N. Y. Life Ins. Co.* v. *Dingley*, 93 Fed. Rep., 153, and *Rosenplanter* v. *Providence Sav. Life Assr. Soc.*, 96 Fed. Rep., 721, in which the Circuit Courts of Appeals of the Ninth and Sixth Circuits show the difficulty of interpretation under the New York statute relating to forfeitures. The *Dingley* case sets out the New York statute and also sets out a notice doubtlessly prepared and used in hundreds of thousands of cases by the respondent herein, and holds the notice fatally defective. The same kind of a notice was given in this case.

The fact is disclosed by the *Dingley* case, and, indeed, by all the cases cited by Judge Caldwell from New York State and the Federal Courts, that the respondent company itself has never been able to prepare a form of notice under the New York statute and its form of policy sufficient to work a forfeiture for nonpayment.

This would seem to be sufficient proof of the difficulty of interpretation and the uncertainty and ambiguity of the provisions of the agreements in controversy to warrant this Court in saying, as was said in *Fidelity & Casualty Co.* v. *Lowenstein*, 97 Fed. Rep., 20, that there is created "a doubt as to its proper interpretation of sufficient gravity to be resolved in favor of the insured."

Not only is the counter proposition (the policy) a part of the same agreement as the application (proposition) between which there is a loss to the assured of thirteen days' insurance as conceded by Judge Sanborn, but the application contains the provision (p. 12), "that any policy which may be issued under this application shall *not* be in force until the payment to and acceptance of the premium by said company;" with which should be considered the 7th finding, as follows, to-wit:

"By the express understanding had between F. W. Smith, the agent of the New York Life Insurance Company, and Frank E. McMaster, when the application for insurance was signed, it was agreed that the first year's premium was to be paid by McMaster upon the delivery to him of the policies, and that the contract of insurance was not to take effect until the policies were delivered;" and the further provision of the falsified interlineation, "please date policy same as application," the meaning of which is construed in the defendant's answer as controlling the insurance (par. 2, p. 20), in the following words, to-wit:

"Said application also contained a request that said five policies each should be issued, dated and take effect the same date as the application, namely, the 12th day of December, 1893, and said request was complied with, and the policies were so issued;" which likewise involves a proposition and counter proposition to the extent of thirteen days' variation in the time when the insurance went into effect. Provisions thus diametrically opposed to each other would seem to make manifest the inconsistency and ambiguity of the insurance contract, and thus furnish the basis for a rule of construction permitting a recovery.

X.

THE EFFORT OF PETITIONER TO SECURE THE WRIT OF CERTIORARI IN THE EQUITY CASE SHOULD NOT PREJUDICE HIS RIGHTS IN THIS LAW CASE.

Judge Sanborn suggests that the views expressed in the opinion of the Circuit Court of Appeals in the equity suit (N. Y. Life Ins. Co. v. McMaster, 87 Fed. Rep., 63) met with the approval of this Court, because an application to have the writ of certiorari issued to review that decision was denied (171 U. S., 687).

The evidence in this law case was taken anew, and the special findings of Judge Shiras settle for this case material facts to the very opposite of what the Circuit Court of Appeals assumed to be true in the equity case. The evidence in this case is materially different, and the findings settle in favor of the assured material questions which in the equity suit were left in controversy, and, indeed, determined adversely to the petitioner. As Judge Caldwell says:

"Not one case cited by the majority is an authority on the facts of this case. Even the decision of this Court, when this case was here on a bill to reform the policy, is not in point in this case because some of the material facts found by the Circuit Court in this case, and which are conclusive upon this Court now, were disputed and denied by this Court in the equity case."

This Court has never considered this case, and it will not be claimed that the equity suit has any binding force upon this. The opinion of Judge Shiras in the equity suit is found in 78 Fed. Rep., 33, and is thought to be sufficiently pertinent and perspicuous to ask this Court to

read the same, and to that end said opinion is printed as an appendix to this brief.

CONCLUSION.

The petitioner respectfully asks this Court to direct a judgment in his favor if permissible under the law (Ft. Scott v. Hickman, 112 U. S., 150); but if not so permissible, then he asks that the judgment of the Circuit Court of Appeals and of the Circuit Court be reversed and the case remanded with suitable instructions to the Circuit Court to grant a new trial.

Respectfully submitted,

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Of Counsel for Petitioner.

APPENDIX.

McMASTER v. NEW YORK LIFE INS. CO.

(Circuit Court, N. D. Iowa. W. D. January 4, 1897.)

Bill to reform five policies of insurance, issued upon the life of Frank E. McMaster.

F. E. Gill for complainant.

Park & Odell and Swan, Lawrence & Swan for defendant.

SHIRAS, District Judge. From the evidence submitted in this case it appears that the New York Life Insurance Company, whose home office is in the city of New York, in the year 1893 was engaged in the business of life insurance at Sioux City, Iowa; that in the month of December, 1893, five contracts of insurance were entered into between the company and one Frank E. McMaster, then a resident of Sioux City; that the conditions attached to and forming part of the policies the company was then issuing contained, among other provisions, the following:

"All premiums are due and payable at the home office of the company, unless otherwise agreed in writing, but may be paid to agents producing receipts signed by the president, vice president, second vice president, actuary or secretary, and countersigned by such agents. If any premium is not thus paid on or before the day when due, then (except as hereinafter otherwise provided) this policy shall become void, and all payments previously made shall remain the property of the company."

"After this policy shall have been in force three months, a grace of one month shall be allowed in payment of subsequent premiums, subject to an interest

charge of five per cent. per annum for the number of days during which the premium remains due and unpaid. During said month of grace, the unpaid premium, with interest, as above, remains an indebtedness due the company, and, in the event of the death during the said month, this indebtedness will be deducted from the amount of the insurance."

It further appears that in December, 1893, one F. W. Smith was engaged in soliciting insurance on behalf of the defendant company at Sioux City, and was the person who secured the application for insurance from F. E. McMaster; and in his testimony he says that when soliciting the insurance, he called McMaster's attention to the 30 days' grace that was allowed in payment of premiums, and further stated to him that the payment of the premium on the delivery of the policy would carry his insurance over a period of 13 months; and this witness further testified that when McMaster signed the application which was filled out by the witness nothing was said therein about the date of the policy, but that subsequently the witness, without the knowledge of the applicant, inserted therein the words, "Please date policy same as application;" that this was done because the company was paying an extra bonus of seven dollars per thousand for all insurance obtained in the year 1893, and it was desirable to have the policy bear date of that year, in order to secure the bonus to the agent obtaining the insurance. The application bears date December 12, 1893, but the policies, when issued, were dated December 18, 1893, and each reads as follows:

"The New York Life Insurance Company, by this policy of insurance, doth promise and agree to pay one thou-

sand dollars at its office in the city of New York to the insured's executors, administrators, or assigns, immediately upon receipt and approval of proofs of death, during the continuance of this policy, of Frank E. McMaster, of Sioux City, in the county of Woodbury, state of Iowa (herein called the 'insured'). This contract is made in consideration of the written application for this policy, and of the agreements, statements and warranties thereof, which are hereby made a part of this contract, and in further consideration of the sum of twenty-one dollars and ——— cents, to be paid in advance, and of the payment of a like sum on the twelfth day of December in every year thereafter during the continuance of this policy. * * * The benefit and provisions placed by the company on the next page are part of this contract, as fully as if recited over the signature thereto affixed."

The provisions thus referred to contain, among others, those already set forth at length. It further appears that the first year's premium of $21 on each of the five policies was paid by the insured on the 26th day of December, 1893, and the policies were then delivered to him. It also appears that no further payments of premiums were made; and that Frank E. McMaster died at Sioux City on the 18th day of January, 1895; that the present complainant was duly appointed administrator of his estate; that, upon demand made, the defendant company refused to pay the amount called for by the policies, upon the ground that the policies had lapsed for nonpayment of the second premiums thereon; that thereupon the administrator brought an action at law in this court upon the policies, which is still pending, and afterwards filed the present bill to procure a reformation of the policies, by changing the date of payment of the second and subse-

quent premiums from December 12th to December 18th, on the ground that the date named in the policies, to-wit, December 12th, is an error, and does not correctly represent the actual contract existing between the parties. The action of complainant in filing the present bill was doubtless brought about by the intimation given by the court when the law action was before the court upon demurrer—that in that action the date of the payment of the second premiums must be held to be in fact that named in the policies, and that, no matter what the facts were, a court of law must construe the contract of insurance as it was written, and that, if it did not correctly represent the contract of the parties, resort must be had to a court of equity for the reformation thereof.

The questions presented upon the record have been very fully and ably argued by counsel, and, with the assistance thus afforded, I have examined the contract of insurance, and have reached the conclusion that the right of recovery is not dependent upon the date when the second year's premiums are made payable by the terms of the policies. In determining the true construction of the contract between the company and the insured, regard must be had to all of its provisions, and furthermore, if there is uncertainty and ambiguity with regard to some of the provisions of the contract, resulting from the language used in different clauses thereof, that construction most favorable to the insured must be adopted, upon the familiar principle that, as it is the company that prepares the contract, the insured not being consulted with regard to the form thereof, all doubts in regard to its meaning must be solved against the company. *National Bank* v. *Insurance Co.*, 95 U. S., 673; *Grace* v. *Insurance Co.*, 109 U. S., 278, 3 Sup. Ct., 207; *Moulor* v. *Insurance Co.*, 111 U.

S., 335, 4 Sup. Ct., 466. The contract is not one which, by its express terms, is to terminate at a given or named date. It is provided, in the conditions annexed to the policy proper, that if the insured should be living on the 12th day of December, 1913,—that is, 20 years after the date of the policy—and should have made due payment of the premiums, then the insured could convert the policy into cash, or into a paid up policy, or into an annuity. Until this date, however, should be reached, the continuance of the policy is made dependent upon two contingencies, to-wit: the continuance of the life of the insured, and the payment of the premiums called for by the terms of the policy. When the first year's premiums were paid, and the policies were delivered to the insured, they constituted contracts for the life of the insured, subject to be forfeited by the nonpayment of premiums according to the terms of the policies, or, after the lapse of 20 years, to be converted as already stated. Thus, in *Insurance Co.* v. *Statham*, 93 U. S., 24, it is said:

"We agree with the court below, that the contract is not an assurance for a single year, with the privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for nonpayment of any of the stipulated premiums."

In construing the contract of the parties and their acts in connection therewith, the rule is to avoid forfeiture when it may be fairly done. Thus, in *Insurance Co.* v. *Norton*, 96 U. S., 234, it is ruled by the Supreme Court that:

"Forfeitures are not favored in the law. They are often the means of great oppression and injustice. And,

where adequate compensation can be made, the law in many cases, and equity in all cases, discharges the forfeiture, upon such compensation being made. It is true, we held in the *Statham* case, 93 U. S., 24, that, in life insurance, time of payment is material, and cannot be extended by the courts against the assent of the company. But where such assent is given, the courts should be liberal in construing the contract in favor of avoiding a forfeiture."

In *Insurance Co.* v. *Eggleston*, 96 U. S., 572, it is declared:

"That courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so on which the party has relied and acted. Any agreement, declaration, or course of action on the part of an insurance company, which leads a party insured honestly to believe that, by conforming thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract."

In *Thompson* v. *Insurance Co.*, 104 U. S., 252, it is said:

"We do not accept the position that the payment of the annual premiums is a condition precedent to the continuance of the policy. That is untrue. It is a condition subsequent only, the nonperformance of which may incur a forfeiture of the policy or may not, according to the circumstances. It is always open for the assured to show a waiver of the condition, or a course of conduct on the part of the insurer which gave him just and reasonable ground to infer that a forfeiture would not be exacted."

To the same effect are the rulings in *Insurance Co.* v. *Doster*, 106 U. S., 30, and *Insurance Co.* v. *Russell*, 144 U. S., 439, 12 Sup. Ct., 671.

Bearing these principles in mind, let us now consider what the contract was which the parties entered into, and whether the same was in force at the date of McMaster's death. In the application signed by McMaster it is stated that the sum to be insured was $5,000, the premium to be payable annually on the ordinary life table. As already stated, when the solicitor for the company was seeking to induce McMaster to apply for insurance, he called his attention to the clause in the provisions annexed to the policies issued by the company, wherein it is provided that after a policy has been in force three months, then a month's grace is allowed in the payment of the next premium, and thus, when the first annual payment is made in full, the assured is protected for the period of 13 months. There can be no question, therefore, that when McMaster signed the application for the insurance in question he understood that, if he paid the first annual premium in full, the policies that he would receive would continue in force for the period of 13 months from their date; that is, that the same could not be forfeited by a failure to pay a premium within that time. The testimony of Smith, the solicitor of the company, further shows that the understanding had with McMaster when the application was signed was that the first annual premiums were to be paid in full when the policies were delivered, and, in fact, the first premiums were so paid. Therefore, when McMaster signed the application, his understanding of the proposed contract of insurance, which he contemplated securing, was that the first annual premiums were to be paid in full when the policies

were delivered, and that these payments, when made, would secure him against a forfeiture on part of the company for a period of 13 months. The provision in the policy is that, "during the said month of grace, the unpaid premium, with interest as above, remains an indebtedness due the company, and, in the event of death during said month, this indebtedness will be deducted from the amount of the insurance." This clause clearly points to a month of grace not covered by the premium already paid, and fully justified McMaster in the assumption that, if he paid the first annual payment in full, he would be entitled to one year's protection, and also to one month of grace to be added thereto, or, in other words, to a period of 13 months, during which the policies could not be declared forfeited by the company. If there exists some question touching the meaning to be given to this clause, it must be solved against the company; and, furthermore, the evidence shows that the company, through its soliciting agent, construed the clause in question to mean that the payment of the first annual payment would protect the insured against a forfeiture for the period of 13 months, and used that construction as an inducement to secure the insurance from McMaster, and the company ought not to be permitted to now construe the clause in the policy in a manner different from that which it relied upon when soliciting the insurance.

The evidence in the case shows that the insurance was solicited, the application was signed, the first annual premiums were paid, and the policies were delivered, at Sioux City, Iowa, the place of residence of the insured, and therefore the relation of the solicitor, Smith, to the parties, is controlled by the statute of Iowa upon that subject. *Assurance Soc.*, v. *Clements*, 140 U. S., 226, 11

Sup. Ct., 822; *Indemnity Co.*, v. *Berry*, 1 C. C. A., 561, 50 Fed. 511. By the Acts of the 18th General Assembly of the State of Iowa (chapter 211, p. 209) it is declared that "any person who shall hereafter solicit insurance or procure applications therefor, shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application, or on a renewal thereof, anything in the application or policy to the contrary notwithstanding." In *Cook* v. *Association*, 74 Iowa, 746, 35 N. W., 500, the Supreme Court ruled that the above section applied to all kinds of insurance companies, including those engaged in life insurance. Therefore, when the solicitor, Smith, represented to McMaster that by paying the one annual payment on the policies about to be issued he would secure a period of 13 months during which the policies could not be forfeited, by reason of the clause in the policies giving a full month of grace, Smith, as agent of the company, put a construction upon the clause which is now binding upon the company. The facts of this case bring it fully within the ruling of the Supreme Court of the United States in *Insurance Co.* v. *Chamberlain*, 132 U. S., 304, 10 Sup. Ct., 87. In that case it appeared that the application required the applicant to state whether he had any other insurance on his life. The fact was, he was a member of various co-operative associations, and by reason thereof he had insurance on his life to the amount of $12,000. The applicant stated the facts fairly to the soliciting agent of the company, who took the view that co-operative insurance of the kind held by the applicant was not insurance within the meaning of the question in the application, and therefore wrote "No" as the proper answer to the question. The Supreme Court held that, under the statute of Iowa, the solicitor was agent of the company, and that the company was estopped from

claiming that the insurance held by the applicant in co-operative companies was in fact insurance within the meaning of the application, or, in other words, held that the interpretation put upon the question by the soliciting agent when the insurance was applied for bound the company when suit was brought to recover upon the policy. Therefore, it is made clearly to appear that McMaster was induced to apply for and take the insurance upon his life in the defendant company upon the understanding that, if he paid the first annual premiums upon each policy, he would secure contracts of insurance which could not be forfeited within a period of 13 months. The first annual premiums were paid, the policies, bearing date December 18, 1893, were delivered, and the insured died within 13 months from the date of the policies; and the company refuses payment and denies liability on the ground that the second year's premiums had not been paid at the date fixed in the policy or within a month thereafter, and therefore the policies have been forfeited. The date fixed in the policies for the payment of the second and subsequent premiums is the 12th day of December, and it thus appears that the second premiums were made payable in advance of the termination of the first year for which the premiums were paid when the policies were delivered. If the theory contended for on behalf of the company is correct, it follows that by the device of making the second and subsequent payments due on the 12th day of December, instead of the 18th, the date of the policies, the insured and his estate are deprived of the benefit of the month's grace which McMaster was assured he would be entitled to, when he applied for the insurance. Furthermore, if this construction of the policy is sustained, it makes it possible for the company, after using the month's grace as an argument to secure insur-

ance, then to escape the obligation by the simple device of so writing the policies as to make the second payments come due a month in advance of the date of the policies. The argument on behalf of the company is that there was nothing said in the application with regard to the date of the second and subsequent payments, and therefore the company had the right to fix the date, and the insured, by receiving the policies without objection, and paying the first premium, agreed to the date named in the policies, and is bound thereby.

Assuming that at law the parties are bound by the date thus fixed for the second payment of the premiums, the question still remains whether, from the fact that the second and subsequent premiums are made payable on he 12th of December, it necessarily follows that the policies could be declared forfeited by the company until after the expiration of the 13 months from the date thereof. At law, the question would seem to turn upon the proposition whether McMaster, by paying the first annual premium in full, became entitled to a contract of insurance which could not be forfeited until after the expiration of 13 months, because, if that was the contract, then the court would be justified in so construing the clause with regard to the forfeiture for nonpayment of subsequent premiums as to hold that the same did not become applicable and in force until after the expiration of the 13 months period. There can be no question, under the facts of this case, that when McMaster signed the application for the insurance he understood, and the company, then represented by its soliciting agent, understood, that, if the officers of the company at the home office accepted the risk, by paying one year's premium in full McMaster would secure contracts of insurance which could not be

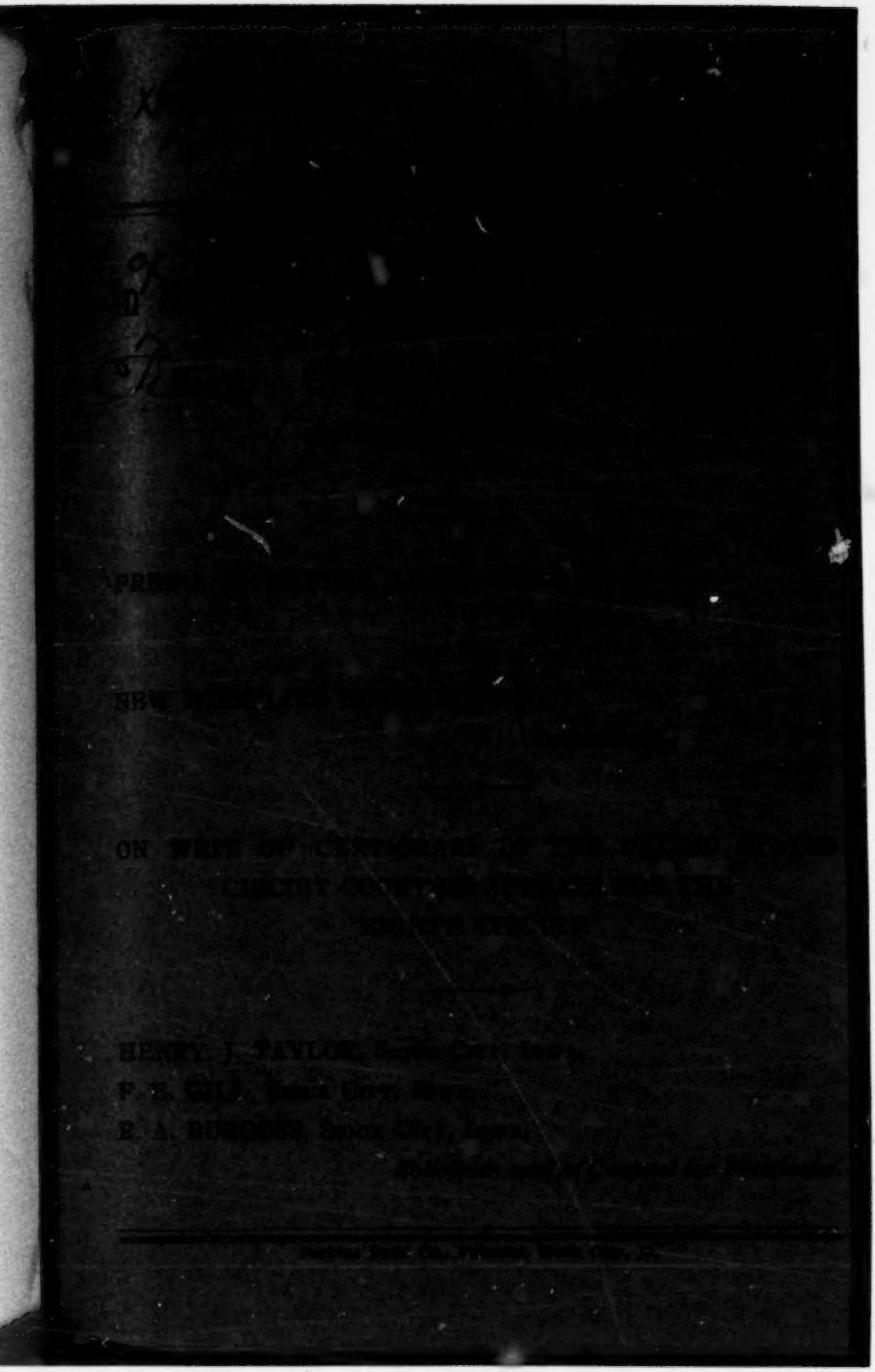
forfeited until after the expiration of 13 months. The company accepted the risk, and issued policies for the required amount, dating the same December 18th; and the defendant, in its answer, avers "that on or about the 25th day of December, 1893, the said policies were delivered to the said Frank E. McMaster, who received the same, and paid the first year's premiums thereon." If the policies had not antedated the time for the payment of the second and subsequent premiums, making the same payable in advance, there would be no question of the liability of the company, because, it being admitted that the first year's premiums were paid in full, then the insured became entitled to a month's grace; and the insured died within the month of grace, thus entitling the company to deduct from the face of the policy the amount of the second premium, with interest thereon. When the policies were delivered to McMaster upon payment of the first year's premiums, there were then created valid contracts of insurance upon the life of McMaster, not for one year, but continuing contracts extending over the life of the insured, which could not be forfeited for nonpayment of premiums, so as to deprive the insured of the protection thereof during any period of the time covered by the payments already made. Therefore, at law, the question is, for what period of time were the policies rendered nonforfeitable by the payment of the first year's premiums? It is admitted that the contracts of insurance did not take effect until December 26, 1893, when the first year's premiums were paid, and the policies were delivered to the insured. If these policies did not contain the clause allowing one month's grace, the payment of the premiums would certainly have prevented a forfeiture for one year from December 26, 1893. Unless a period of a month be added thereto, the insured is deprived of the benefit of the

period of grace which was promised him. If this period is allowed, then the policies were in force at the date of McMaster's death. Upon what theory or principle can the insured be rightfully deprived of the benefit of this period?

It cannot be questioned that if the company had followed the usual rule, and had made the time for the payment of the second and subsequent premiums to count from the date of the policies, there would be no doubt of the liability of the company. The policies are dated December 18, 1893. If the second and subsequent premiums had been made payable on December 18th in 1894 and subsequent years, then the month's grace would date from December 18th, and the policies would not be forfeited until after January 18th following. The defense of the company is rested on the fact that it made the second and subsequent premiums payable on December 12th in 1894 and subsequent years. It is not claimed that this date was agreed upon between McMaster and the company. There is no evidence showing that, when the policies were delivered, his attention was called to this date, or that he in fact knew that December 12th had been named in the policies as the time for the payment of the subsequent premiums. In the answer filed by defendant it is expressly averred that "no directions were ever given or request made by the deceased, or any agreement made, that the premiums should be made payable on any specified date." The evidence justifies the conclusion that the defendant company agreed with McMaster to insure his life, and to issue to him contracts of insurance to take effect when the first year's premiums thereon were paid, and to be nonforfeitable for a period of 13 months; that the company issued policies for the amounts agreed upon,

and delivered the same on December 26, 1893, receiving, at that time, payment of one year's premiums in full, and thereby became bound to pay the agreed sums, provided McMaster died while the policies were in force; that by the terms of the contract of insurance the policies could not be forfeited until 13 months had elapsed; that, it being admitted by the defendant that there was no agreement between McMaster and the company with regard to the time when the second and subsequent premiums should become payable, the company could not, by its own act in antedating time of payment of the subsequent premiums, deprive McMaster of the protection of the contracts of insurance during the period of 13 months from the date of the first payment. If it be true that the payment of the first year's premiums made the policies nonforfeitable for a period of 13 months, then at law the court is justified in holding that the forfeiture claimed by reason of the nonpayment of the second premiums could not be availed of by defendant until the period of 13 months had elapsed, and would not be a defense to a claim based upon the death of McMaster within the period of 13 months from the taking effect of the contracts of insurance. If, however, it should be held at law that the policies are so worded that they can be declared forfeited because the second premiums had not been paid on the 12th day of December, 1894, or within a month thereafter, then it is clear that the policies should be reformed so as to correspond to the real contract of the parties. As already stated, the evidence shows that it was the agreement of the parties that the policies were to take effect upon delivery, and that they were not to be delivered until the premiums were paid; and it also clearly appears from the evidence that McMaster expected to receive, and the company contracted to deliver, poli-

cies which would be nonforfeitable for a period of 13 months; and it now appears that the company, although it admits that there never was any agreement authorizing it to antedate the time for the payment of the second premium, of its own motion did so antedate the time for such payment, and claims that by so doing it has deprived McMaster of protection during the full period of 13 months, during which period it had previously agreed the policies should be in full force and nonforfeitable. Although, as herein indicated, the proper legal construction of the policies shows that they were in force when McMaster died, yet as the defendant company is insisting that the policies, as written, had then been forfeited by reason of the fact that the second premiums had been made payable on the 12th of December, it being admitted that this was done without the consent of the insured, and as it is clear that it was not the contract of the parties that the 13-months nonforfeitable period should begin to run on the 12th of December, 1894, there is ground upon which the complainant can rest in asking a decree of reformation, and such decree will therefore be granted in favor of complainant.



In the Supreme Court of the United States.

OCTOBER TERM, 1900.

NO. 199.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FRED A. McMASTER, ADMINISTRATOR,
Petitioner,

vs.

NEW YORK LIFE INSURANCE CO.,
Respondent.

STATEMENT OF THE CASE.

This is an action brought by the petitioner, Fred A. McMaster, as administrator of the estate of Frank E. McMaster, deceased, against the respondent, New York Life Insurance Company, upon five policies of insurance, all dated December 18, 1893, for $1,000 each, upon the life of the deceased. The assured died January 18, 1895. The policies were delivered and received under emphatic representations that they would and did contain provisions granting thirteen months of insurance for the first annual premium.

After the application was signed by the assured and delivered to the agent on December 12, 1893, at Sioux City, Iowa, the agent, without the knowledge or consent of the assured, wrote on its face these words: "*Please date policy same as application.*" It was this forged interpolation of the agent to further his own private interests that caused all the trouble (6th finding, pp. 32-3).

The company did not follow the secret direction of its agent, but dated the policies December 18, the date of their issue in New York, and made the annual premiums payable December 12, the date of the application. By oral agreement and by express provision of the application (par. 4, p. 12), which became a part of the policies, the policies were not to go into force or effect until after their delivery and the payment of the first annual premium (7th finding, pp. 53-4), which took place in Sioux City, Iowa, on December 26, 1893.

The respondent's answer alleges that the words, "please date policy same as application," constituted "a *request* that said five policies each should be issued, dated and take effect the same date as the application, namely, the 12th day of December, 1893, and said request was complied with, and the policies were so issued" (par. 2, p. 20). The application *as signed* by the assured did *not* contain such a "request," but did contain a provision diametrically *opposed* thereto (par. 4, p. 12), namely, "that any policy which may be issued under this application *shall not be in force* until the actual payment to and acceptance of the premium by said company or its authorized agent." The special findings (6 and 7, pp. 32-3) conclusively determine that the so-called "request" *was not in the application* when it was signed by the assured, but that after it had passed into the possession of the agent of the respondent, such agent, *without the knowledge or assent of the assured*, wrongfully interpolated such "request" into the application in order to secure an extra bonus or agent's commission for December, 1893, business. The home office acted

upon the application without the assured having had any knowledge of the "request," and it does not appear that he "ever knew that these words had been written into the application" (6th finding, p. 33). It is further conclusively determined by the findings that it was *not* agreed that the contract of insurance should go into effect December 12th, but on the contrary, as stated in the written application and under the oral agreement of the parties, the insurance was not to take effect until the payment of the premium and the delivery of the policies (7th finding, p. 33; par. 4, p. 12).

If the answer (par. 2, p. 20) purports to assert that McMaster was insured from and after the 12th day of December, 1893, then that allegation not only finds no support in the findings, but they conclusively determine the contrary, as there is nothing in either the policies or the application to warrant even the suggestion of insurance prior to the date of the policies, or as we contend (although it is immaterial in this case), prior to the payment of the premium and the delivery of the policies.

The respondent concedes the month of grace on all its policies (par. 2, p. 20), but contends that the so-called "request" permitted and actually directed the insertion of a provision in the policies by which the contract of insurance, so far as the same rested on the payment of the first premium, should terminate at the expiration of thirteen months from December 12th, 1893, instead of thirteen months from either the date of the policies, December 18, 1893, or as provided in the application (par. 4, p. 12), thirteen months from the date of the actual payment of the premium and the delivery of the policies, which was December 26, 1893 (9th finding, p. 37). In other words, the agreed thirteen months of insurance is alleged to have been reduced by the so called "request" from thirteen months for the first premium to exactly twelve months and seventeen days, which reduction is admitted to have been solely caused by the forged interpolation.

To induce the taking of the insurance, the respondent's agent pressed upon McMaster certain provisions *adopted* by the company and set forth in printed circulars issued by the company, and in provisions printed on the back of its policies under the heading, "Benefits and Provisions referred to in this Policy," reciting that after the policies had been in force three months a grace of one month would be allowed in the payment of subsequent premiums (3d finding, p. 32).

The application was signed December 12, 1893, in reliance upon such provisions, emphasized by oral representations, and in the belief that if the assured accepted policies of insurance upon his life from the respondent, and paid the premiums thereon annually, the company could not assert the right of forfeiture until *thirteen months* had elapsed after the payment of the last annual premium (4th finding, p. 32).

By express oral agreement when the application was signed, which agreement was confirmed in the written application (p. 12, div. 4), the first year's premium was not to be paid until the delivery of the policies in Sioux City, Iowa, and the contract of insurance was *not* to take effect until the policies were there delivered (7th finding, p. 33). The policies were not in fact dated the same as the application (which was dated December 12), but were dated December 18, and the second annual premium instead of being made payable on December 18 (which was the date of the policies), or even one year after the date of delivery (December 26), was *dated back* to December 12, the date of the application.

The five policies, enclosed in one envelope, on December 26, 1893, were taken by the agent of the respondent to the office of McMaster in Sioux City, Iowa, who there and then asked the agent if the policies were written *as had been represented*, and if they would insure him for the period of *thirteen months* for the first premium, to which the agent replied that they did so insure him, and thereupon McMaster paid the agent the full first annual premium, and without reading the

policies received them, and placed them away. At the inception of their interview the agent and the assured were interrupted by the entrance of a client, and the assured thereupon desisted from an examination of the policies, and accepted them on the representations of the agent as to their contents as aforesaid (p. 105). The agent of the company did not in any way attempt to prevent McMaster from reading the policies, and he had full opportunity to read them, but in fact did not read them, *and accepted them on the statements so made by the agent* (9th finding, pp. 33-4).

In December, 1894, McMaster was examined for insurance in the Union Central Life Insurance Company under the agreement that that company should not issue the new policies until in January, 1895, and *after* the expiration of his insurance in the respondent company, only *a part* of whose policies the assured had decided to continue in force, and on January 15, 1895 (three days before his death), McMaster instructed the agent of the Union Central Company to continue to hold his new policies in that company for the reason that his insurance in the respondent company *had not yet expired*. McMaster believed that his policies in the respondent company would continue in force for at least the period of *thirteen months from their date*, and relying upon that belief, he was delaying the consummation of the proposed insurance in the Union Central Company as late as January 15, 1895 (findings 12, 13, 14, pp. 34-5). He died January 18, 1895, without having paid the second premium on the policies in controversy, nor had his policies in the Union Central Company then been delivered (15th and 16th findings, p. 35).

A jury was waived and the case tried to the Court, the Honorable O. P. Shiras presiding. The Court based his judgment on special findings, which are brief, and are found on pages 31-5 of the record. The form of the policy containing the form of the application, is annexed to the petition, is made a part of the findings, and is set out on pp. 6 to 14 inclusive.

The opinion of Judge Shiras was with the petitioner, but he rendered judgment in favor of the respondent, because, while not bound thereby, he yet felt constrained to follow an opinion of the Circuit Court of Appeals given in a former equity suit between the same parties to reform the policies in controversy. Judge Shiras (p. 52) invited an appeal from his own judgment in this case in these words:

"If free to give judgment according to my own view of the questions involved, I should find for the plaintiff; but, as already stated, the Circuit Court of Appeals held in the equity case (87 Fed. Rep., 63) that there could be no recovery on the policies at law or in equity, and I deem it my duty to follow this ruling, leaving it to the plaintiff to carry this action at law before the Court for its further consideration; and, therefore, while my opinion is with the plaintiff, the judgment must be for the defendant."

ASSIGNMENT OF ERRORS.

The errors assigned are four in number, but only one in substance, and are set out on page 61 of the record, and need be repeated here only in substance. The petitioner assigns error in that the special findings of fact are insufficient to entitle the respondent to judgment, and do not support the same, and that under the findings of fact, as a matter of law, judgment should have been rendered in favor of the petitioner and against the respondent for the amount found to be due on the policies.

BRIEF OF THE ARGUMENT.

I.

THUS FAR TWO JUDGES HAVE FILED SEPARATE OPINIONS IN FAVOR OF, AND TWO JUDGES SEPARATE OPINIONS AGAINST A RECOVERY.

There are as many written opinions in this case as there are judges who have heard it. Judges Shiras and Caldwell hold that the petitioner should recover. Judges Sanborn and Thayer hold that he should not.

The opinion of the trial court, Judge Shiras, is found in the record, pp. 35-52.

The opinion of the same judge in the former equity case is annexed as an appendix to petitioner's brief in this Court in support of his petition for the writ of certiorari, and is worthy of careful consideration in connection with this case.

The dissenting opinion of Judge Caldwell, sustaining a recovery, is found on pp. 84-101 of the record.

The opinion of Judge Sanborn, denying a recovery, is found on pp. 71-83 of the record.

The opinion of Judge Thayer, also denying a recovery, is found on pp. 83-4 of the record.

We assume that this Court will read all of these opinions.

The separate opinion of each of these distinguished jurists bears evidence of careful study and exhaustive research, as well as of strong personal convictions on the merits of the controversy. While Judges Shiras and Caldwell substantially agree, Judges Thayer and Sanborn concur in the result reached rather than in the reasoning leading thereto. By this reference the petitioner makes the opinions of Judges Shiras and Caldwell a part of his brief, and asks consideration thereof as if restated herein.

This case has gotten beyond the counsel for the respective parties. It has developed into a struggle for supremacy as between the far-reaching legal principles championed by the judges arrayed on either side of the controversy. It is now the Court's case. The number of policyholders and the amount paid in premiums is now so enormous that life insurance companies have become great investment companies into which people are annually pouring millions upon millions for the future protection of their dependent and loved ones. A strict accountability has become a necessity as a matter of wholesome public policy. No fraud should be allowed to rob the beneficiaries of the purchased protection.

We ask indulgence in presenting further argument here, not with the expectation of adding anything new to the exhaustive research and argument of the judges who have already considered the case, but with the hope that a review of their several opinions may in some degree assist this Court in its consideration of a case that is important far beyond anything that is merely personal to this petitioner.

II.

IN THE CIRCUIT COURT OF APPEALS, THE CASE TURNED ON THE PAROL-EVIDENCE RULE. IT SHOULD HAVE TURNED ON THE DOCTRINE OF ESTOPPEL.

Judge Sanborn admits that the policies are not responsive to the agreements for insurance, but constitute what he terms "*a counter-proposition*" upon the one controlling inducement that secured the business for the company, to-wit: thirteen full months of insurance for the first annual premium.

It is concluded by the special findings that the assured was to receive a policy the terms of which would grant him thirteen full months of insurance for the first annual premium. Judge Sanborn's alleged "counter-proposition" reduces this time to twelve months and seventeen days, thus depriving the assured of nearly half of the promised extra month of grace,

which was so successfully heralded to attract business by the agent, and "by circulars issued by the company" (3d finding, p. 32), and by the provisions printed on the back of the policies. This "counter-proposition" was delivered to the assured *without advising or warning him that the policies involved a "counter-proposition"* and with an emphasized denial thereof.

More than this, in response to the comprehensive inquiries of the assured, put to the agent at the moment of the delivery of the policies and the payment of the first premium, the company represented that the terms of the policies were just as had been agreed—that they insured him for the full period of thirteen months for the first annual premium—and the assured, relying upon the representations so made as to existing provisions contained in the completed policies, accepted them, placed them away unread before the eyes of the agent, to whom he then paid "the full first annual premium."

It is urged that such conduct as is disclosed by the special findings estops the company from asserting the provisions of the policies, if any, that would deprive the assured of thirteen full months' insurance from the agreed time, and as stated in the application, to-wit: thirteen months' insurance from December 26, 1893, the date of the delivery of the policies and the payment of the premium, or at least from December 18, 1893, the date of the policies. The assured bought and paid for that much insurance in advance. The statements of the agent in reference to the existing terms of the policies were known to him to be false, and were relied on by the assured to his damage. That the guilty party may not render his fraud effectual, the parol-evidence rule must yield to the rule of equitable estoppel.

Insurance Co. v. *Wilkinson*, 13 Wall., 222
Equitable Ins. Co. v. *Hearne*, 20 Wall., 494.

The party responsible for the fraud or other vice inherent in a contract estops himself from setting it up, and *parol evidence is admissible to establish and furnish the basis for the es-*

toppel. Under the rule of estoppel the statement, "please date policy same as application," is not the direction of the assured but of the company itself, and the company must bear all the consequences naturally, reasonably or actually flowing from its conduct.

Insurance Co. v. *Chamberlain*, 132 U. S., 304, 311.
Insurance Co. v. *Mahone*, 21 Wall., 152, 156.
Insurance Co. v. *Wilkinson*, 13 Wall., 222.
New Jersey Ins. Co. v. *Baker*, 94 U. S., 610.
North Am. Ins. Co. v. *Throop*, 22 Mich., 146.
Patten v. *Ins. Co.*, 40 N. H., 375, 380.
McMaster v. *Insurance Co.*, 78 Fed. Rep., 86.
Marston v. *Insurance Co.*, 89 Me., 266.

The company by its conduct estopped itself from insisting that the policies delivered gave less than thirteen full months of insurance for the first annual premium, because to permit that would result in the perpetration of a legal fraud. This does not involve any inconsistency between the parol evidence rule and the doctrine of equitable estoppel; but if it does, then the former must give way to the latter. The parol evidence rule is itself not a rule of evidence. It is rather an inhibition against evidence, for various reasons, chief among which is that solemn writings are more trustworthy than memory, all in the interest of ascertaining and enforcing justice and honesty.

The parol-evidence rule, however, is not the only controlling rule that Courts have recognized. The doctrine of estoppel is, perhaps, the greatest legal principle of modern times in its elasticity and efficiency to prevent the perpetration of wrong. If a writing otherwise dominated by the parol-evidence rule has been procured through fraud, deceit, overreaching, or in any way that puts fair play and honest dealing to shame as a matter of intention or ultimate result, then the sanctity and force of the written instrument is removed, and the party claiming under it is disabled from so using it as to impose a loss or hardship upon the party overreached or to

consummate a fraud. The doctrine of estoppel then steps in with a voice of supreme authority and declares that the written instrument has forfeited the right to invoke the parol-evidence rule, because procured through mistake, fraud or deceit—things that cannot be tolerated in a court of justice. When these rules clash Courts let that one prevail which has its foundation in good conscience.

To put it another way, a writing can never prevail under the parol-evidence rule unless it is a writing of good, equitable reputation or character. If it is shown to be a fraud and a cheat, its right to command must cease, and its voice must be silenced by the supreme doctrine of equitable estoppel, which brooks no opposition to its purpose of rendering fraud ineffectual. That is the position of Judges Caldwell and Shiras.

If the written agreements in controversy do not give thirteen full months of insurance for the first annual premium then they have so bad a character that the doctrine of equitable estoppel becomes controlling, and must abrogate the parol-evidence rule.

The month of grace is a conceded fact (pp. 9 and 20), and that in connection with the application, constitutes an agreement for thirteen months' insurance from the delivery of the policies for the first annual premium (findings 3, 4, 7, 8, 9, 12, 13 and 14, pp. 32-35).

Conceding for the purpose of this argument that the policies do not grant thirteen months of insurance, the agent knew this. The company admits that the "request" contained in the forged interlineation was material in determining how the policies should be written up, and insists that it complied therewith (p. 20). The delivery of such a "counter-proposition" without advising the assured that a counter-proposition was involved would of itself have amounted to fraudulent concealment; but that is not the case. Here the assured was prevented from discovering the "counter-proposition" by the agent's positive statement of the provisions of the policies.

He trusted to the honesty of the company by asking whether the provisions of the policies were as represented, and the company responded, "yes." To make sure that the "nice provision" had not been overlooked, he asked if they (the policies) insured him for the period of thirteen months, to which the agent replied that they did so insure him, and, thereupon, relying upon said representations of the company as to *existing facts* concerning the *completed* policies, he accepted them, placed them away *unread* before the eyes of the agent, who then and there reached out his hand and received "the full first annual premium, or the sum of $21 on each policy" (9th finding, pp. 33-4), and went on his way rejoicing in the security of his "bonus" (6th finding, pp. 32-3).

The record shows more than "a counter-proposition." It shows a contemptible fraud, prompted by the avarice of the agent, the fruits of which the company strives to secure under the technical parol-evidence rule, and the petitioner, as his only resource, asks this Court to prevent iniquity by enforcing an estoppel in pais.

III.

ABOVE THE RULE OF PAROL EVIDENCE AGAINST VARYING OR CONTRADICTING THE TERMS OF THE WRITTEN CONTRACT IS THE DOCTRINE THAT ONE CANNOT USE PROVISIONS PROCURED THROUGH MISTAKE, FRAUD OR DECEIT TO PERPETUATE THE SAME. THE ASSURED NEVER ASSENTED TO THIS UNKNOWN, UNSUSPECTED, UNDISCLOSED AND CONCEALED "COUNTER-PROPOSITION."

The following cases sustain this proposition:

Union Ins. Co. v. *Wilkinson*, 13 Wall., 222, 236.

Continental Ins. Co. v. *Chamberlain*, 130 U. S., 304.

In *Insurance Company* v. *Mahone*, 21 Wall., 152, the application was read over to the assured and voluntarily signed by him, nevertheless parol evidence was received.

In *Insurance Company* v. *Olmstead*, 21 Mich., 251, Judge Cooley said:

"When an agent, who at the time and place is the sole representative of the principal, assumes to know what information the principal requires, and after being furnished with all the facts, drafts a paper which he declares satisfactory, induces the other party to sign it, receives and retains the premium moneys, and then delivers a contract which the other party is led to believe, and *has a right to believe*, gives him the indemnity for which he paid his money, we do not think the insurer can be heard in repudiation of the indemnity, on the ground of his agent's unskillfulness, carelessness or fraud. If this can be done it is easy to see that the community is at the mercy of these insurance agents, who will have little difficulty in a large proportion of the cases in giving a worthless policy for the money they receive."

The representations of the agent do not constitute a legal conclusion, for the parties were not discussing language known to each. The inquiry of the assured was directed to the point whether or not the policy contained the promised thirteen months provision, and the parties never considered any specific language essential to form the basis for a legal conclusion or personal opinion.

It is well known that matters are thoroughly thrashed out at the time of the application, and that the policy itself is received as a matter of course, the assured resting confidently in the belief that the policy contains provisions responsive to the settled understanding of the parties as represented by the formal application.

If the policies delivered contain a provision permitting a forfeiture at the end of only twelve months and seventeen days of insurance for the first annual premium, then parol evidence is admissible to exclude that provision and defeat so premature a forfeiture because it violates the admitted and concluded agreement of the parties, and ought not to have been inserted, and is not the contract of the parties in that respect.

The case of *Kausal* v. *Ins. Co.*, 31 Minn., 21 (cited by this Court in 177 U. S., 273), is interesting. Judge Mitchell therein cites the cases of *Mahone*, *Wilkinson* and others, and shows what the established law is, and then says:

"After the Courts had generally established this doctrine, many of the insurance companies, in order to obviate it, adopted the ingenious device of inserting a provision *in the policy* that the application, by whomsoever made, whether by the agent of the company or any other person, shall be deemed the act of the insured and not of the insurer,"

and meets the "ingenious device" by the statement that "if corporations are astute in contriving such provisions, Courts will take care that they shall not be used as instruments of fraud or injustice," and holds that the provision thus injected into the policy was not a part of the instrument making up the contract, and permitted a recovery just as though that provision had not been written into the policy.

In *Insurance Company* v. *Baker*, 94 U. S., 610, the answer in the application was written by the company's agent, who "undertook to construe and interpret the answers of the applicant," and the Court held that "the evidence objected to was admissible to show that the statement was not that of the applicant, *although signed by her*. The statement was one prepared by the company, for which it was responsible, and it cannot be set up to defeat its policy."

In *North American Ins. Co.* v. *Throop*, 22 Mich., 146, in speaking of the admission of parol evidence in this class of cases, Judge Cooley said:

"We think evidence of these facts was competent. Its purpose was, not to vary or contradict the contract of the parties, but to preclude the party who had framed it from relying upon incorrect recitals to defeat it, when he, himself, had drafted those recitals, and was morally responsible for their truthfulness."

It is clearly established by the findings that the insurance in the respondent company was induced by its alleged superior provision for *thirteen months' insurance for the first annual premium*. If the policy by its terms grants, as Judge Sanborn says, under the "counter-proposition" only twelve months and seventeen days' insurance, instead of thirteen months' insurance, it remains true that this difference of fourteen days was not a

fact that would have deterred the company from accepting the risk. Indeed, its willingness to grant thirteen full months of insurance was heralded by its agent, by its printed circulars, and by its printed indorsements, as a superiority of its policies over those of other competing companies.

This is not a case where a statement falsifies a fact in any way conditioning the insurance, and which if stated truthfully would have caused a refusal of the risk. There was no concealment, and no occasion for concealment, for the point in controversy would not have influenced the respondent in accepting or rejecting the insurance. The assured firmly believed that the policies would remain in force for thirteen months from at least their date, and acted solely upon that belief in accepting the policies and in postponing the taking out of other insurance, even as late as January 15, 1895 (findings 12, 13, 14, 16, pp. 34-5). He was led to believe that he had thirteen months' insurance by the representations made to induce the taking thereof, by the printed circulars of the company, and by the application itself, and he accepted the policies in reliance thereon (findings 3 and 4, p. 32). In spite of the express finding, and in spite of the express provision in the application, fixing the time at which the contract of insurance was to take effect, the respondent now contends by its answer that the contract of insurance took effect from the date of the application (par. 2, p. 20). This, however, was not the agreement, and the findings are to the contrary. The application itself (par. 4, p. 12) fixes the time when the contract of insurance would commence, and the answer (par. 2, p. 20) admits the granting of a month of grace on all the policies of the respondent in addition to the full year. Moreover, in delivering the policies, the respondent represented that they contained provisions granting the agreed thirteen months' insurance, and upon that representation the respondent received, and still retains, the full first annual premium, knowing that the assured accepted the policies unread relying thereon, and relying upon the further fact that no provision could rightfully be incorporated

into the policies violative of this paramount agreement of the parties inducing the insurance.

If the words "please date policy same as application" had not been interpolated into the application, the annual premiums would certainly not have been made payable earlier than the date of the policies, not only because that was the agreement of the parties, but because the usual custom of the company would not have permitted the insertion of an earlier date than that, and certainly not in view of paragraph 4 (p. 12) of the application making express provision against insurance pending negotiations, or pending the period of time between the making of the application and the issuing and delivery of the policies. It is, therefore, absolutely certain that the policies in controversy would have permitted a recovery under the facts of this case, if the words "please date policy same as application" had not been inserted in the application. It is equally clear that these words, "please date policy same as application," were wrongfully interpolated by the agent without the knowledge or consent of the assured, and for the express purpose of securing for himself an extra bonus (6th finding, pp. 32-3). And it is equally certain that the respondent was very willing to grant thirteen months of insurance for the first premium.

It is conceded by Judge Sanborn that the policies violate the original agreement, and instead of granting thirteen months' insurance, grant insurance for only twelve months and *seventeen days*. Judge Sanborn calls this the "counter-proposition" contained in the policies.

It is admitted by the respondent's answer (par. 2, p. 20) that the date, December 12th, on the face of the policies, for the payment of the annual premium, was there written solely because of this so called "request," or forged interpolation, "please date policy same as application," and under the findings the so called "counter-proposition" was not only never brought to the attention of the assured, but was most skillfully concealed from him under positive representations, made in

response to exacting inquiries, that the policies contained the provision for thirteen months' insurance.

Judge Sanborn cites the case of *Kausal* v. *Ins Co.*, 31 Minn., 17, 21, to sustain his position; but we think it sustains the position of the petitioner. In that case the clause that the agent procuring the insurance was the agreed agent of the insured, was transferred from the application, where it had been so frequently inserted and rendered unavailable under repeated decisions, to the policy itself, and the Court permitted a recovery just as though the unauthorized provision had not been inserted *in the policy* at all, because it was wrongfully inserted therein, and was not the agreement of the parties.

The case in controversy would have been the same, in substance, if the agent had wrongfully, and without the knowledge or consent of the assured, inserted in the application, instead of the words, "please date policy same as application," the words: "the contract of insurance issued hereunder shall be in force for the first annual premium not to exceed twelve months and seventeen days," and the company had copied into the policy this exact provision. It seems clear to us that, under the *Kausal* and similar cases, in that event the company could not have defeated the petitioner's cause of action, because of such a forged interlineation in the application, for such a provision for only twelve months and seventeen days' insurance instead of thirteen months' insurance would not represent the agreement of the parties. As to such a clause, the application would not be the instrument that was signed. Nor should the situation be changed by carrying over such a forged interlineation in the application into the policy itself, for it would still remain true that the clause reducing the insurance from thirteen months to twelve months and seventeen days would not be responsive to the genuine application, and would not be the agreement of the parties, would not be such a clause as the company would *have a right* to insert in the policy, because never brought to the attention of the assured or consented to by him. To further apply the

hypothesis to the facts of this case, the assured would pay his premium relying on the belief that the policy contained no such clause, enforced by the affirmative representations of the company that it was not tendering a counter-proposition, and by its active and affirmative statements and representations actually inducing the assured to place his policy away unread. Such representations would not amount to a legal conclusion, but would be representations as to an existing fact—an agreed provision in the policy itself. The parties would not be considering the legal effect of known language, as no language would be under consideration, but only the existence in the policy of a provision for thirteen months' insurance.

Phoenix Ins. Co. v. *Allen*, 109 Ind., 272.
Plumb v. *Insurance Co.*, 18 N. Y., 392.
Howe v. *Provident Soc.*, 34 N. E. R., 830, 1–2.
Insurance Company v. *Leon*, 37 N. E. R., 584.
Sullivan v. *Insurance Company*, 34 Kan., 170.
Kausal v. *Ins. Co.*, 31 Minn., 21, approved 177 U. S., 260.

Parol evidence is certainly admissible to show that the present forfeiture provision is not the agreement of the parties; to show that as to this their minds never met. *But the contract for insurance nevertheless remains valid. The counterfeit forfeiture provision which resulted from the forged interpolation alone falls.* The petitioner does not ask the Court to make a new contract, but only to enforce the genuine one by the application of the doctrine of estoppel. A contract of insurance was actually put into force by the parties. This is conceded by everybody. The only controversy is as to when the admitted insurance contract should end. *The application does not say that the policies shall contain a forfeiture clause*, without which they would continue for life. Courts do not like forfeitures very well. They must be clearly made out. The one sought to be enforced was never agreed to by McMaster. Under provisions that did not allow the policies to go into force before delivery, the company followed no custom in making the annual premium date *earlier* than the date of the poli-

cies. Its conduct was unusual, extraordinary, never done before—bad faith—and ought not to bind. It violated custom, good-faith dealing, and the plain terms of the application. The assured was lulled and lied into a failure to read the policies. He paid his money on the faith of thirteen months' insurance. There was bad faith on the part of the agent or the company, or both. The assured was innocent, honest and truthful. He made sure that the signed application was all right. The rest was done by the company's agent and by the company itself. The assured was not permitted to write his own policy. He did not sign it as he did the application. The company relegates to itself the care of the formally signed application and the writing of the policy. It assumes the duty of making the policy issued conform to the terms of the formal application. If there is a forged interpolation by the agent in work imposed on him by the company and in connection with which the assured owes no duty, the company should stand the loss and recover from its dishonest agent. Respondent invited the assured to trust *its* agent. Should McMaster's family lose indemnity because he did? The response given by the company to the "request" makes it the real wrong-doer. By accepting and retaining the benefits of the agent's act the company ratifies the entire transaction and cannot escape the consequences thereof. Insurance for thirteen full months would have been gladly accorded to McMaster *at the same price.*

To ask or agree upon thirteen months was no fraud on the respondent. This was the very basis on which it pushed and solicited insurance. It took and keeps the full price. Only the assured is wronged because the plain duty of writing a policy to conform to the genuine application was violated. That duty the company assumed. Its failure to perform that duty can be profitable only to itself. The duty to read the policy is not the same in degree as the duty to read the application. The fact that the assured must sign the application shows that the company relies on him to get that right. But the assured, having done this, may confidently rely on the

He did not combine with the agent to impose on the company.

company to write the policy in conformity with the application. If the assured performs his duty and the agent takes advantage of the forwarding duty imposed on him *by the company as its agent*, where should the loss fall?

IV.

EVEN IF IT SHOULD BE GRANTED THAT IT WAS McMASTER'S DUTY TO READ THE POLICIES, STILL HIS NEGLECT TO DO SO CAN BIND HIM ONLY TO WHAT THE COMPANY HAD A RIGHT TO INSERT THEREIN.

This statement is too favorable to the respondent, because the omission of the asssured to read the policies can hardly be called neligence when that omission was procured by his known reliance on positive misrepresentations of existing facts by the respondent at the moment of the delivery of the policies, and the receipt of the premium therefor. Bad faith is worse than negligence.

This Court has said in *Insurance Company* v. *Hearne*, 20 Wall., 420, that the assured "had a right to assume that the policy would correctly conform to the agreements thus made and *to rest confidently in that belief*."

In *Knights of Pythias* v. *Withers*, 177 U. S., 260, this Court approved the following language:

"The Court might have gone further and designated it as a dishonest condition. It was the assertion of a falsehood, and an attempt to put that falsehood into the mouth of the assured. It formed no part of the contract of insurance. That contract consists of the application and the policy issued in pursuance thereof. In point of fact the assured does not see the policy until after it is executed and delivered to him. In many instances it is laid away by him and never read, especially as to the elaborate conditions in fine print. *Grant that it is his duty to read it, his neglect to do so can bind him only for what the company had a right to insert therein.* He was not

bound to suppose that the company would falsely assert, either by direct language in the policy or by reference to a by-law, that a man was his agent who had never been his agent, but who was, on the contrary, the agent of the company. Notwithstanding this was a mutual company, the assured did not become a member thereof until after the insurance was effected. Hence, a by-law of the company of which he had no knowledge, and by which he was not bound, could not affect him in matters occurring before the granting of the policy. * * * And even a by-law of a mutual company which declares that black is white does not necessarily make it so. Similar cases are those of *Eilenberger* v. *Protective Mut. F. Ins. Co.*, 89 Pa., 464; *Susquehana Mut. F. Ins. Co.* v. *Cusick*, 109 Pa., 157; and *Kister* v. *Lebanon Mut. Ins. Co.*, 128 Pa., 553."

Inasmuch as this Court has thus approved the case of *Kister* v. *Insurance Company*, 128 Pa., 553, brief quotations therefrom may be made:

"We cannot say that the law, in anticipation of a fraud upon the part of a company, imposed any absolute duty upon Kister to read his policy when he received it, although it would certainly have been an act of prudence on his part to do so. *Howard F. Ins. Co.* v. *Brunner*, 23 Pa., 50; *Union Mut. L. Ins. Co.* v. *Wilkinson*, 13 Wall., 222. One thing is certain, however, the company cannot repudiate the fraud of its agent, and thus escape the obligations of a contract consummated thereby, merely because Kister accepted in good faith the act of the agent without examination."

We refrain from citing the decisions of the several State Courts upon this proposition, more especially because many of them are cited in the opinion of Judge Caldwell. However, as this case comes from Iowa, we will cite decisions by that Court.

In *Fitchner* v. *Fidelity Mut. F. Asse.*, 103 Iowa, 276, 279, the Court said:

"Doughty was the agent of the company, and acted in that capacity in preparing the application. The insured ordinarily rely upon the agent to properly set out the facts in the application, and Laub did as men usually do, in assuming that the defendant's agent had done his duty. *Stone* v. *Insurance Co.*,

68 Iowa, 737; *McComb* v. *Insurance Co.*, 83 Iowa, 247. The mere failure of the assured to read his application, or the copy of it on the policy, does not establish negligence. *Bennett* v. *Insurance Co.*, 70 Iowa, 600; *Hagan* v. *Insurance Co.*, 81 Iowa, 321; *Donnelly* v. *Insurance Co.*, 47 Iowa, 353. Nor is mere omission to read the policy negligence. *Barnes* v. *Insurance Co.*, 75 Iowa, 11; *Jamison* v. *Insurance Co.*, 85 Iowa, 229; *Boetcher* v. *Insurance Co.*, supra. Laub had no reason to suppose the policy and application were drawn differently than understood."

Dyer v. *Ins. Co.*, 82 N. W. R., 82 (Iowa).

Hartford Steam Boiler Inspection & Ins. Co. v. *Cartier*, 89 Mich., 41, 48, was a case of a "counter-proposition," or rather a new provision, which was held not binding because the insured's attention was not called to the clause. The concealment was held to be fraudulent, although a silent concealment, while the "counter-proposition" in the case at bar was not made in silence, but under emphatic representations that only the genuine proposition was involved. This *Cartier* case is interesting and pertinent. The following quotation from it is approved in a note to May on Insurance, 4th ed., sec. 200:

"Conditions and restrictions in insurance policies, to be binding upon the insured, must be inserted without fraud, misrepresentation or concealment. In order to charge the insured with the duty of an examination of his policy with reference to new matter introduced into it, he must be left free to discharge that duty unaffected by the company's representations, and not be led to neglect it by the conduct of the company itself. The company cannot be allowed to evade his questions, mislead him, suppress the truth, and lull him to sleep regarding new restrictions which it has injected into the policy, and thereafter charge him with constructive knowledge of those restrictions. The company obtained this very policy by inducing defendant to cancel a policy in the American; and, presumably to prevent the American from doing just what plaintiff was then doing. It introduces into the new policy a clause taking away a privilege which defendant had exercised under the old policies. Not only was defendant's attention not called to this change, but, when asked with

reference to an exercise of the right of cancellation, plaintiff's agent neglects a plain duty, conceals the fact of change, and misleads and deceives the defendant. The question here is not as to the effect of a naked acceptance of a policy without examination, but as to whether, in the absence of actual notice a party can be bound by a new restriction in a policy concerning the existence of which he has been lulled to sleep, and actually misled and deceived. In *Gristock* v. *Insurance Co.*, 49 N. W. Rep., 634, Justice Grant, speaking for this Court, said: 'Plaintiff had a right to rely upon the assumption that his policy would be in accordance with the terms of his oral application. If the defendant desired to make it anything different he should, in order to make it binding upon plaintiff, have called his attention to those clauses which differed from the oral application.' "

The mutual intention of the parties that a full month of grace should be added to the year's insurance is admitted in the policies and findings and pleadings (pp. 9, 32, 3d and 4th findings; par. 2, p. 20).

The application fixed the time when the year's insurance should begin as of the date of the "actual payment to, and the acceptance of the premium by, said company" (par. 4, p. 12), and the special findings further confirm the agreement of the parties in this regard (7th finding, p. 33).

The assured, therefore, in the language of this Court in the *Hearne* case, *supra*, in the absence of notification, "had a right to assume that the policy would correctly conform to the agreement thus made, and to rest confidently in that belief," and as further stated in the *Withers* case, *supra* (177 U. S., 260), the assured could at most be bound for "*only what the company had a right to insert therein.*"

V.

IT IS UNCONTRADICTED THAT THE GRIEF OF THIS CONTROVERSY WAS WROUGHT, WITHOUT THE KNOWLEDGE OR CONSENT OF THE ASSURED, BY THE WRONGFUL INTERPOLATION IN THE APPLICATION, BY THE AGENT OF THE INSURANCE COMPANY, OF THE WORDS, "PLEASE DATE POLICY SAME AS APPLICATION," (6th FINDING, p. 32). THIS WAS DONE "BY THE AGENT IN ORDER TO SECURE TO THE AGENT A BONUS WHICH THE COMPANY ALLOWED TO AGENTS FOR BUSINESS SECURED DURING THE MONTH OF DECEMBER, 1893."

In delivering the policies in question, we assert that the company is chargeable with a positive legal fraud.

The company, upon reading the fraudulent interpolation, disregarded the agreement contained in the application (p. 12, par. 4), to the effect that the insurance should not be in force until the delivery of the policies and the payment of the premium, and while it dated the policies December 18th, the day the risk was advised in New York, it made the second annual premium payable December 12th, the date of the application, all for the secret purpose of increasing the agent's bonus (6th finding, p. 32).

Judge Sanborn, p. 79, admits that the policies were not responsive to the application. He says:

"The applications were nothing but a proposition to take insurance. They were not contracts, but mere requests for, or a proposition to take, policies. The company was not bound to grant these requests or to accept the proposition. It had the right to reject them *in toto* or to reject some parts of them and to make a *counter-proposition*. It took the latter course. *It rejected some parts of the applicant's proposition and made a counter-proposition.*"

The policies by their terms expressly made the application a part of the contract (p. 6).

The company could not deliver a "counter-proposition" without notice to the insured that a counter-proposition was involved. It has agreed to deliver a specific contract, and only

with the knowledge and consent of the assured could it deliver any other and take and keep the premium. The assured is bound only by such a contract as the company had a right to deliver, and the company is estopped from asserting that the effect of the contract delivered is otherwise than would be the case if it had delivered the genuine proposition which the assured had a right to expect, and which he justly believed he was receiving. The counterfeit proposition was not delivered by reason of any act or request of the assured, but solely by reason of the forged interpolation and subsequent conduct of the agent. If the fraudulent request of the agent had not been made, or had been disregarded and the policies regularly issued, then this controversy could never have arisen, and the rule of estoppel will not now tolerate any defense that would result in working a forfeiture so procured, or in securing to the company any advantage from the fraud.

Thirteen full months of insurance for the first premium, as represented by the company in its printed circulars and by its agent, was the dominant and controlling inducement to the insurance contract. It was, therefore, dishonest and fraudulent to deliver a counter-proposition which eliminated the sole inducement to the contract, without advising the assured that the policies contained a "counter-proposition." It was doubly dishonest for the company, through its agent, to stand up and in the face of the assured, in response to his inquiries, deny, as strong as language is capable of putting it, that the policies contained any counter-proposition, and assert to the contrary that they contained provisions for thirteen months of insurance for the first premium, and were in all their terms as had been represented, intending and knowing that such representations of existing facts at the moment of delivery, in the midst of an interruption (p. 105), induced the immediate payment of the full first annual premium, put the assured off his guard, and induced him to put the policies away unread.

But the contention of the respondent itself, while equally untenable, differs from that of Judge Sanborn.

Paragraph 2 of the company's amended and substituted answer (p. 20) alleges that the words in the application, "please date policy same as application," amount to a "request that said five policies each should be *issued, dated and take effect* the same date as the application, namely, the 12th day of December, 1893, and said request was complied with, and the policies were so issued."

This is the company's deliberate understanding and interpretation of the meaning and effect to be given to those words. It admits that the fraud of the agent was material in determining how the policies should be written up. At any rate, its present position is fixed by its answer as to the natural and actual effect to be given to the interpolated request of its agent. As to this surreptitious and falsified interpolation, admittedly so acted upon by the company as to thus far defeat a recovery upon the policies, the Circuit Court made an express finding (6th finding, pp. 32-3) to the effect that it was inserted by the company's agent after the application had been signed and delivered to the company, without the knowledge of the assured, and the assured never learned of it (findings 9, 12, 13, 14, pp. 33-4).

The application as signed and delivered called for a whole year's insurance (exclusive of the month of grace) not to take effect *until the delivery of the policies and the payment of the premium*, to-wit: on December 26, 1893 (par. 4, p. 13, and 7th finding, p. 33). The forged interpolation, "please date policy same as application," is construed by the company itself in its own amended and substituted answer as a request (par. 2, p. 20) to have the policies take effect at the date of the application, to-wit: December 12, 1893; and the answer declares that such was the import and result of the interlineation, and that the company strictly complied therewith in the form of the policies delivered. It is too clear for argument that the defendant did not carry any risk until the policies were delivered and the premium paid—December 26, 1893. The Court of Appeals admits this.

The application called for a whole year's insurance, not from the date of the application, but from the date of the delivery of the policies and the payment of the premium. This was the express agreement now settled by an express finding (7th finding, p. 32). The falsified insertion of the company's agent is, therefore, admitted to be diametrically opposed to the express agreement made conclusive upon this Court by the 7th finding (p. 33). *The company insists that the policies by their terms are responsive to the falsified interpolation, and not to the agreement as found in the 7th finding, or to the genuine application.*

It is pertinent and proper to insist that the company's own interpretation of the natural meaning and the actual result of the agent's interpolation conclusively makes it the falsified interpolation of the company itself.

The only "request" addressed to the company in this regard was the agent's wrongful insertion in the application, which the answer of the company (par. 2, p. 20) now makes responsible naturally and actually for the entire grief of this controversy.

Judge Sanborn says that this interpolation (p. 80) is immaterial, first, because it was not complied with; and, second, because it misstated no fact which conditioned the insurance. But the company's answer (par. 2, p. 20) insists that it was complied with, and shows a material and inconsistent provision, naturally and logically robbing the assured of his express agreement with the company (7th finding, p. 33), and that it determined how the policies should be written up. Judge Shiras expressly found that the promise of thirteen months' insurance for the first premium conditioned the insurance on the part of the assured. Add to the falsified interlineation the additional falsehoods at the time of the delivery of the policies and the payment of the premium (findings 4, 9, 12, 13, 14), presumably made and intended to put the assured off his guard, and we have both legal fraud and bad faith. The conduct of the company through its agent is certainly worse than

any alleged negligence of the assured, and it is pertinent to inquire on whom the loss should fall. Had it not been for the wrongful insertion, unknown to and concealed from the assured, the defense to this suit admittedly would have no basis, and the respondent should be estopped from reaping any advantage from the fraud. The respondent ought not to be allowed to plead its own wrong to forfeit and defeat the policies.

Continental Ins. Co. v. *Chamberlain*, 132 U. S., 304.
Union Mut. L. Ins. Co. v. *Wilkinson*, 13, Wall., 222.
Am. Ins. Co. v. *Mahone*, 21 Wall., 152.
N. J. Mut. L. Ins. Co. v. *Baker*, 94 U. S., 610.

Had the assured died prior to December 26th, 1893, the company would and could have successfully denied the existence of any binding insurance contract, under the terms of the application (par. 4, p. 12), and yet it now says in its answer (par. 2, p. 20) that the policies took effect December 12, 1893, responsive to the agent's forged interpolation, notwithstanding the express agreement of the parties (7th finding, p. 33), repeated in the application, that the contract of insurance should *not* take effect until the delivery of the policies, to-wit: on December 26, 1893.

We ask to be indulged in reiterating that the interpolation, "please date policy same as application," was forged by the agent of the company after the application had been signed and delivered to the company, to gratify his cupidity, without the knowledge of the assured, and was affirmatively concealed from the assured, and that the company's own answer says "said application also contained a request (please date policy same as application) that said five policies each should be issued, dated and take effect the same date as the application, namely, the 12th day of December, 1893, and said request was complied with, and the policies were so issued." But the policies did not "take effect the same date as the application." The finding and the contract are both to the contrary.

At whose door is laid the cause of petitioner's loss, if he must lose? The company admits by its answer that this con-

troversy is grounded upon the words, "please date policy same as application," and on the testimony of the agent himself, the trial court found the interpolation material, wrongful and unknown to the assured. Were it not for this insertion, the payment of the second premium certainly could not have been called for at a date earlier than the actual date of the policy, which would have obviated this whole controversy.

A forfeiture could not be asserted in this case but for the fraudulent counter-proposition delivered to the assured, and the doctrine of estoppel will not permit the company to avail of a forfeiture so procured.

VI.

THE APPLICANT MADE SURE THAT THE APPLICATION AS SIGNED CONFORMED TO THE AGREEMENT. THE COMPANY ASSUMED TO ITSELF THE DUTY OF TENDERING A POLICY IN CONFORMITY WITH THE APPLICATION.

If the request, "please date policy same as application," means that the insurance shall be in force from December 12, the date of the application, as alleged in the answer (p. 20), it is plainly contrary to the application *as signed*. By reading the application at the time of signing and delivering the same to the agent, this fatal insertion could not have become known for the simple reason that it was interpolated afterwards by the respondent's agent. What might be the law had this fatal clause been in the application when signed, but not noticed because not read, is not before the Court. The fact that applications must be signed would seem to impose an obligation to read before signing. At most one is bound to know its contents only as signed. McMaster was not negligent in not discovering that fatal "request" because it was first inserted by the respondent's agent after it came into the local office

signed. The fatal "request" was written into the policy without the fault or knowledge of the assured. Its presence there was due solely to the cupidity of the agent. It was the agent's fault that the "request" appeared in the application when it was received at the home office. The assured did not know of it; he had made no such "request." *As signed* the application contained *the very opposite* request and agreement. The applicant did agree that the policy might rest on and conform to the application as the basis of the contract. He never agreed that the policy might conform to or rest on forgeries subsequently and secretly interpolated into the application. He made sure that the application was right when he signed it. The duty of writing a policy that conformed thereto and of copying the application into the policy was the *self-assumed* duty of the respondent. The forgery was interpolated by the chosen and accredited agent of the respondent. The trusting of the application for transmission to the agent of the local office was authorized by the respondent. Indeed, after the signing, the applicant is not permitted to possess the application. The respondent should bear the consequences of a fraud so clearly originating with its own accredited and authorized agent, even if innocent itself. Well may May on Insurance, 4th ed., p. 292, say in commenting on the *Fletcher* case: "If the agent had altered the application after A. (assured) had once made sure it was right and signed it, the case would wear a different aspect." The fault is exclusively that of the agent and the company. Technically, the fault lies at the door of the home office. The agent's interpolation was of course wrongful and unknown to the assured. But the words, "please date policy same as application," do not necessarily mean that the policy shall "*take effect*" from the date of the application. It seems to have been so construed, however. The answer says so (par. 2, p. 20). Yet such was not its natural import when read in connection with par. 4, p. 12, of the same application, stating that the policy was *not* to be in force until after payment of the premium and delivery. This necessarily

meant a date later than the writing up of the policy at the home office. Therefore, the fault may even be lifted from the agent and laid at the door of the home office of the respondent itself. But even if the payment of this loss should be considered one that the agent wrongfully imposed on his company, the custom of the company to exact bonds from its agents (31 Iowa, 225), or even the relation of agency itself, is a sufficient protection by allowing to the company a recovery over, or to indemnify itself against the agent. The fraud, however, was upon the applicant alone, for the company was very willing to give everything that is claimed for the money it received. The policy does not respond to the application *as signed*, and we think not even to the application as it now appears, through the fault of either the agent or the respondent, or both. To thus rob the assured of the only feature or provision that induced the contract is bad faith, and bad faith is much worse than negligence.

VII.

THE COMPANY WOULD AS READILY HAVE GRANTED THIRTEEN FULL MONTHS' INSURANCE FOR THE FIRST ANNUAL PREMIUM AS TWELVE MONTHS AND SEVENTEEN DAYS.

The findings show that the full thirteen months of insurance for the first annual premium was the controlling and winning inducement to the contract. Both parties knew that this provision secured the insurance. It was the point of superiority of the respondent's policy over the policy of competing companies. While the assured would not have signed the application nor accepted the policies if he had known that he was not getting thirteen full months of insurance, the respondent would not have refused to make the contract, but would just as readily have made it knowing that thirteen full

months of insurance were given. While this provision did not condition the insurance on the part of the company, it did condition the insurance on the part of the assured. It was his belief in the truth of the representation of thirteen months' insurance that secured the payment of the premium. Had McMaster not been lulled into receiving the policies without reading, he would not have received them at all. It is a distinguishing fact in this case that not twelve months and seventeen days, but thirteen full months of insurance was the heralded superiority of the policy of this company, and thirteen full months would just as readily have been granted as only twelve months and seventeen days. The fourteen days' reduction was not material or vital, or in any manner controlling, in the taking of the risk on the part of the respondent, but only on the part of the assured. A thirteen months' contract was not a fraud upon either party. It is certain that the respondent would just as readily have made the annual premiums payable on the 18th as on the 12th of December, save only for the forged request. The insured was innocent of any wrong intent, and believed that he was insured for thirteen full months, and in reliance upon that belief he postponed the taking of other indemnity. The only possible change of position because of the request was a reduction in time prejudicial only to McMaster. The company does not lose, but gains by the fraud of its agent, in which the assured had no part. This is not either good law or good morals. Neither the company nor the other policyholders can be said to suffer an unjust loss by permitting a recovery. They would not have avoided this loss by acting on the genuine application. This is not the case of an undesirable risk taken because of a concealed or unknown fact. The policies would not have been withheld if written up as agreed. An honest policy would have imposed no unexpected or undesired burden on anybody. *The respondent should not now be allowed to recede, after the assured is dead, from a contract that it is absolutely certain it would have willingly made at the beginning save only for its agent's fraud, of which the assured was innocent.*

Inasmuch as the parties agreed in the written
lication that the contract should not be in force
m the date of the application but only from the
te of the delivery of the policy, the company did
t follow but openly violated every business usage
d custom of the insurance world in making the
ntract effective at a date earlier than the date
the policy, not for the purpose of indemnity but
r the single purpose of forfeiture.

VIII.

THE POINT IN CONTROVERSY AFFECTS ONLY THE FORFEITURE CLAUSE. THERE WAS A VALID CONTRACT OF INSURANCE FOR LIFE. THE CONTROVERTED PROVISION DOES NOT GO TO THE FACT OR ESSENCE OF THE CONTRACT.

It seems clear to the petitioner that the minds of the parties met to the end that there should be insurance, and that a consummated contract for insurance resulted. Such a contract is not for a year, or for any number of years, but for life, regardless of the failure to pay subsequent premiums. It is brought to an end only by the provision for forfeiture. This forfeiture provision is only one of a great number of provisions in the contract of insurance, which is a complete and valid contract of insurance without the forfeiture provision. *The minds of the parties actually met on the contract of insurance for life, and that contract is valid and binding upon the respondent. The minds of the parties did not meet on the present forfeiture provision, and, therefore, that provision is not the contract of the parties and is not binding. The doctrine of estoppel allows parol proof of, and will enforce, the actual forfeiture provision.*

IX.

THE PETITIONER CONTENDS THAT THE PROVISIONS OF THE WRITTEN AGREEMENT, WHEN PROPERLY CONSTRUED GRANT THIRTEEN MONTHS OF INSURANCE FOR THE FIRST ANNUAL PREMIUM.

This proposition is so convincingly elaborated by Judge Shiras in his opinion on pp. 35-52 of the record, and in his

opinion in the equity case printed as an appendix to petitioner's brief in support of the petition for certiorari, that we adopt the statement and argument of that learned judge as our argument on this proposition.

This Court, in the *Withers* case, *supra* (177 U. S., 260), has approved the case of *Kister* v. *Insurance Company*, 128 Pa. St., 553, which contains the following language:

"Forfeitures are odious in law, and are enforced only where there is clear evidence that that was what was meant by the stipulation of the parties. There must be no cast of management or trickery to entrap the party into a forfeiture."

The assured paid the first full annual premium, which paid for thirteen months of insurance, counting the month of grace. This much was promised. The promise was positively renewed as an existing fact, under the terms of the completed policies, at the time of the delivery. The assured received and paid for the policies, and the insurance started to run, December 26, 1893. He died January 18, 1895. He paid for thirteen full months of insurance, and the policies are susceptible of a reasonable construction that will grant it. Whatever may be the effect of the date, December 12th, upon renewals for insurance in subsequent years, having accepted and retained the first full annual premium, under the written and oral agreement that the insurance should not begin until the delivery of the policies and the payment of the premium, the assured should not now be subjected to a forfeiture which in effect forfeits insurance already paid for.

"It is claimed that the policy was forfeited *eo instanti* upon October 30, 1895, because the second quarterly premium was not paid upon that date. This contention is based upon a clause of the policy which declares that this policy "shall be *ipso facto* null and void if premiums are not paid when due." The construction of the policy here contended for would recognize and approve a harsh doctrine indeed. It would be carrying the doctrine of forfeiture to unconscionable lengths. By payment of the first quarterly premium, the deceased was insured for three months. This was necessarily the contract be-

tween the parties. This clause of forfeiture for nonpayment of premiums was never intended to forfeit the privileges of insurance already paid for. No insurance policy ever attempted to do such a thing. This contention, if sound, would not only result in the forfeiture of present paid-up insurance, but would result in the forfeiture of a portion of the premiums already paid."

Methvin v. *Fid. Mut. Life Ass'n*, 58 Pac. Rep., 387.

The application that is made a part of the policy, and that preceded it in time, restates the agreement of the parties on the point (par. 4, p. 12), "That any policy which may be issued under this application *shall not be in force* until the actual payment to, and acceptance of the premium by, the company." It necessarily follows, therefore, that the contract of insurance went into effect only on delivery of the policies and the payment of the premium therefor, to-wit: on December 26, 1893. But the company exacted "the full first annual premium, or the sum of $21 on each policy" (9th finding, p. 33). On the face of the policy, in conspicuous location, are the words "annual premium, $21" (p. 6). That bought and paid for a full year's insurance from December 26, 1893, to which must be added the special inducement of an extra month of grace (p. 9), which admittedly was a special feature of this company's policies, that both attracted and secured the insurance in controversy.

The date of payment of the second annual premium may have force in connection with continuing the insurance in force for subsequent years, but was never intended, and ought not to be permitted, to chop off fourteen days' insurance, for which the company received, and still retains, payment. Unquestionably the assured bought *thirteen months'* insurance for $105. The provision that the policy should not go into effect until it was delivered and paid for was material and valid, and would have been asserted by the company if necessary. That provision, if inconsistent with other provisions in the policy (resulting from the forged interlineation), is still a part of the policy, because the application is expressly so made, and preceded the policy in time, and should be held to control in re-

spect to the understanding of the amount of insurance that was secured to the assured for "the full first premium."

Whether the right to continue the policy in force for subsequent years became fixed by the date, December 12th, on the face of the policies, is immaterial, because nothing is claimed under or in respect to any second or subsequent premium; but the company ought not to be permitted to use that date to reduce the period of insurance for which it received, and still retains, the assured's money. The assured was entitled to the insurance *already settled and paid for*, to-wit: thirteen months of insurance whether he made the second annual premium payment on December 12, or never. It is an unjust and unreasonable construction to say that the company promised and intended to grant the assured thirteen months' insurance, and received full payment therefor, by the payment of the full first annual premium, and then adroitly worded its policy so that the assured could not get the promised thirteen months of insurance for the full first annual premium without first paying the full second annual premium.

Under the respondent's contention two annual premiums would have been demanded of the assured within less than one year.

The month of grace is a whole month. No construction is reasonable that takes away fourteen days of the month of grace. Either there is a whole month of grace or there is no grace at all. That appears to be self-evident. The company and the assured agreed that there should be no insurance from the date of the application, December 12th, to the date of the delivery of the policies, and the payment therefor, December 26th. It is so nominated in the bond (par. 4, p. 12), and the same is made a part of the policy (par. 5, p. 12). The company was not entitled, therefore, to payment for the period of non-insurance, and, inasmuch as it clearly stipulated in writing when the policy should go into force, that stipulation should be made effective; and as the company collected and received

"the full first annual premium" it should be held to have sold the assured that which he bought and paid for, namely: a full year's insurance, plus an additional month of grace.

If the *second* annual premium had been made payable on the date corresponding to the date of the policy, to-wit: on December 18th, then this controversy could never have arisen.

Packhill v. *Brighton*, 61 Iowa, 103.
Iowa Code of '97, Sec. 23, p. 125.
Sec. 26, Chap. 677, New York Laws, 1892.

The application contemplates thirteen months' insurance for the first annual premium.

In the application as signed it was provided that "the premium (was) to be payable annually" (5th finding, p. 32). The words "semi-annually" and "quarterly" were stricken out in the record below, but are inadvertently not so stricken out in the printed record here. The fifth finding, however, corrects this error. The opinion of the Court of Appeals says "the application provides that the premiums shall be paid annually." This then means at least a year's insurance for the first premium. The respondent prepared its own forms and was painstaking to state in the application that the policy that might be issued under the application should "*not be in force*" from the date of the application but only "until the actual payment to, and acceptance of the premium by, said company, or an authorized agent, during my lifetime and good health" (par. 4, p. 12). This provision remained in the application when made a part of the policies, and shows the utter falsity of the allegation of the answer (par. 2, p. 20), if that actually means that McMaster was insured from December 12, 1893. The application forbids this, and the risk was not advised or the policy written up or signed until its date, December 18, 1893 (p. 6). The policies on their face make the application a part thereof, and so the same exclusion of insurance from the date of the application to the date of the payment of the premium and the delivery of policies is again emphasized therein. Judge Sanborn argues that time must

elapse between the writing of the policy in New York and the delivery in Iowa. Very true. But if the company exacts the agreement that the insurance shall *not* be in force *until delivery*, it should either adjust the language of the policy as written in New York to the exactions of the application, or else permit the agent to fill in the delivery date theretofore purposely left blank. However, we are not driven to this extent, for there is no custom of making the annual premium payable *earlier* than the date of the policy in the home office, unless the agreement in the application is for immediate insurance. Where, as in this case, the parties agree that the insurance shall *not* go into force until delivery, the custom is universal *not* to make the annual premium payable on a date earlier than the date of the policy, and that is sufficient for a recovery in this case. The application, therefore, calls for a whole year's insurance. The month of grace is an additional month. The giving of this month of grace beyond the year is admitted. The answer (par. 2, pp. 20, 24) pleads it. The policy prints it (p. 9). At the time of the application this feature of thirteen months' insurance was used as an inducement by the agent, who "pressed upon McMaster the provision adopted by the company and set forth in *circulars* issued by the company, and *printed* on the back of the policies"—this month of grace. The application, therefore, contemplates thirteen months of insurance for the first annual premium.

The policies as issued grant thirteen months' insurance for the first annual premium.

The policy makes the application a part of the contract of insurance (p. 6). Each policy on the margin by conspicuous print announces "Annual premium, $21.00." The contract was that the premiums should be paid annually (5th finding, pp. 32, 11). On December 26, 1893, "McMaster paid the agent *the full first annual premium*" (9th finding, p. 33). "It was agreed that the first year's premium was to be paid by McMaster upon the delivery to him of the policies, and that the contract of insurance was *not* to take effect until the policies were delivered" (7th finding, p. 33, and application, par. 4, p. 12). The

month of grace is admitted in the answer (p. 20) and indorsed on the policy (p. 9). Up to this point the written contract shows that McMaster bought and paid for thirteen months' insurance, and that the time should be counted only from the delivery of the policies, December 26, 1893.

But respondent says that these provisions cannot be given their plain literal meaning because of the out of the way fine print indorsement on the back of the policies at the foot of page 8 of the record, and that this, read in connection with the face of the policies, shortens the insurance to twelve months and seventeen days.

The date, December 12, on the face of the policy, in itself need not frighten. It is only oxygen. The forfeiture clause at the foot of page 8 of the record was harmless in itself, and was "concealed in a mass of rubbish on the back of the policy." It is only nitrogen. The explosion comes only when these innocent antipodes are allowed to come together. We join May on Insurance, p. 307, in asking the Court to read Chief Justice Doe's comments on such insurance contracts, printed in his work on insurance, 4th ed., pp. 358-361.

May not these apparently inconsistent provisions be permitted to refer to the right of "renewal" as involved in the payment of subsequent premiums rather than to the shortening of insurance *already paid for?* They could then stand together.

This is the construction given by Judge Shiras (record, pp. 35-52). McMaster understood that the "insurance would continue in force for the period of thirteen months from the date of the policies," and relied thereon even to the postponing of the taking of other indemnity (findings 4, 12, 13, 14, 15, 16, pp. 34-5). The respondent's agent so represented (finding 9). If the New York statute of notice fixes the "due date," then the thirteen months of insurance is consistent with even this forfeiture provision, for the words "when due" in the forfeiture clause (p. 8) would be a date fixed by "the expiration of thirty days after the mailing of such notice" (see argument herein

under headings XI, XII and XVII) and the date on the face of the policy. At any rate the inconsistency creates ambiguity as to provisions which the agent said gave thirteen months of insurance for the first premium, and in this belief and in reliance thereon the insurance was induced and consummated.

X.

NO ESTOPPEL OPERATES AGAINST THE PETITIONER. THE RESPONDENT (p. 21) PLEADS THAT THE PETITIONER IS ESTOPPED FROM QUESTIONING THE FORGED INTERPOLATION.

Section 2, of Chapter 211, Laws of Iowa, approved March 31, 1880 (printed in appendix), provides that the company shall be forever precluded from the benefit of any application unless it attaches a true copy thereof to the policy, and that the insured is entitled to the full benefit thereof whether annexed or not. The company did not attach a true copy to the policy, but a false copy.

The effect of this section would seem to be that the respondent could not use the false copy at all while the petitioner has the right to use the genuine "application or representations of the assured * * * at his option." The Iowa Court has held that this statute does not require that the insured examine the copy of the application endorsed on the policy.

Donnelly v. *Ins. Co.*, 70 Iowa, 696.
Ellis v. *Ins. Co.*, 64 Iowa, 507.
Wallace v. *Ins. Co.*, 66 Iowa, 139, 142.
Cook v. *Fed. L. Ins. Co.*, 74 Iowa, 746.
Sections 1819, 1815 and 1749, Code of Iowa, 1897, retain these laws.

There is, however, a better answer to this position of the respondent, which, in short, is the very equity of the petitioner's cause as developed in his entire brief.

XI.

THE PROVISION (p. 9) OF THE POLICY: "IF ANY PREMIUM IS NOT THUS PAID ON OR BEFORE THE DAY WHEN DUE THEN (EXCEPT AS HEREINAFTER OTHERWISE PROVIDED) THIS POLICY SHALL BECOME VOID, AND ALL PAYMENTS PREVIOUSLY MADE SHALL REMAIN THE PROPERTY OF THE COMPANY," CONTRAVENES THE NEW YORK STATUTE AND IS VOID.

The New York statute (set out in the Appendix hereto) fixes the only possible grounds or manner under which a forfeiture may be successfully declared and enforced. *It is not within the power of the parties to add to, limit or set aside the paramount provisions of the statute.* The mere failure to pay the premium on the stipulated day is not enough to terminate the insurance contract; to do that, the New York statute of forfeiture must be strictly complied with. The foregoing clause, therefore, in the policy, as construed by the Circuit Court of Appeals, should be held null and void.

Hurst Home Ins. Co. v. *Muir*, (Ky.) 53 S. W. R., 3.
Mutual Life Ins. Co. v. *Hill*, 97 Fed. Rep., 263.
Mutual Life Ins. Co. v. *Dingley*, 100 Fed. Rep., 408, 414.
Equitable Assur. Soc. v. *Nixon*, 81 Fed. Rep., 796.
Equitable Assur. Soc. v. *Trimble*, 83 Fed. Rep., 85.
Osborne v. *Home Life Ins. Co.* 123 Cal., 610.
May on Insurance, 4th ed., §356 A, note (a.)
Johnson v. *Ins. Co.*, 109 Iowa, 711.

XII.

THE "DUE DATE" IS AMBIGUOUS, INDEFINITE AND ELASTIC, AND THE ALLOWANCE OF THIRTEEN MONTHS' INSURANCE FOR THE FIRST FULL ANNUAL PREMIUM DOES NOT VARY THE TERMS OF THE POLICIES.

The opinion in *Baxter* v. *Brooklyn Life Ins. Co.*, 119 N. Y., 454, holds that the "due date" is not fixed by the nominal date

of premium payment on the face of the policy, but by the expiration of thirty days after giving the statutory notice. And the dissenting opinion in that case emphasizes the holding of the majority to be that "the premium does not become *due* until after notice and expiration of the thirty days." The "due date," therefore, of the premium, under the *Baxter* case, *supra*, is fixed by the New York statute (set out in Appendix hereto) and not by the face of the policy, and may be postponed beyond the policy date of December 12th, simply by delay in giving the statutory notice. (*Johnson* v. *Ins. Co.*, 109 Ia., 711.)

A note to sec. 356 A, May on Ins., 4th ed., states:

"The New York statute wisely provides that there shall be no forfeiture of a life policy without notice. Under this statute the required notice cannot be waived by agreement, and the forfeiture of a policy for non-payment of premiums does not depend upon such non-payment according to the terms of the policy, but upon their non-payment after the notice prescribed by the statute has been given. *DeFreee* v. *National L. Ins. Co.*, 136 N. Y., 144; *McDougal* v. *Provident Sav. L. Assn.*, 125 N. Y., 551; *McMaster* v. *New York L. Ins. Co.*, 99 Fed. Rep., 856; *Mutual L. Ins. Co.* v. *Dingley*, 100 id., 408; *Hathaway* v. *Mutual L. Ins. Co.*, id. 534; *Johnson* v. *Ins. Co.*, 109 Iowa, 711."

The company had a leeway in the giving of this notice of at least thirty days, and, therefore, was able to extend the "due date" without violating the terms of any agreement whatever, and at the same time fulfill its promises and representations, because the "due date" is determined by the New York statute, and is made to depend upon the giving of the notice. The time when the notice shall be given, or, indeed, the fact of giving any notice at all, finds no expression in the agreements of the parties; nor would delay enough in giving the notice to keep good the promise of the company run against the rule of parol evidence.

Suppose the statutory notice had been mailed twenty-four days before December 12, to-wit: November 18, 1894, then the "due date" would become fixed at December 18, 1894. The Court will observe that this date of December 18 is the ac-

tual date of the policies. The date of the annual premium could not have been earlier under the agreement *not* to put the insurance in force until *delivery* (par. 4, p. 12; 7th finding, p. 33), during which interim the company did not carry the risk. To this must be added a "grace of one month" (p. 9), for grace is a gratuity, an "*undeserved kindness*," which must be additional to and not an over-lapping of the statutory period. This would extend the policies to January 18, 1895, without offending against either the rule of parol evidence or the actual agreement of the parties, and would give the assured twelve months' insurance for the annual premium, and a month of grace not covered by the premium already paid, namely, thirteen months of insurance for the first premium. But for the fraudulent interpolation of the agent this is probably just what would have happened.

Or suppose the statutory notice had been given on November 26. This would have established the "due date" at December 26th, and "the month of grace" would have continued the policies until January 26, 1895, and the assured would have had his policies in force for thirteen months exactly according to the agreement. A policy, however, in force on January 18, 1895, the date of his death, equally answers the purposes of the situation, and the policies in controversy would have been in force January 18, 1895, if the annual premium had been made payable on December 18, that being the date of the policies themselves.

The findings (finding 14, pp. 34-5) expressly state that the assured believed his policies were in force for the period of thirteen months from their date, and acted in a business transaction upon that basis. The words "when due," near the bottom of page 8 of the record, do not in terms refer to the date "the 12th day of December" on the face of the policies (p. 6), and should be held to refer to the statutory "due date" as fixed by the foregoing case of *Baxter* v. *Brooklyn Life Ins. Co.*, 119 N. Y., 454.

Inasmuch as this construction had been given to the identical language of these policies prior to their issue, and the

company permitted the language of its policies to remain unchanged after the *Baxter* case had been made public, and had established the legal meaning of the word "due," the company must be held to have acquiesced in that construction, for otherwise it would and should have revised or changed the language of its policies in respect thereto. The company was advised by the settled law of the *Baxter* case that policy holders would accept their policies relying upon the meaning of the word "due" as established by that case. It could not continue to issue its policies without modifying their terms in this respect, after the statute had been construed by the highest judicial tribunal of its own state, without being held to have acquiesced in, or at least to be absolutely bound by, such judicial construction of the continued language of its policies.

Fidelity & Casualty Co., v. *Lowenstein*, 97 Fed. Rep., 17, and cases therein cited.

XIII.

WHEN POLICIES OF INSURANCE CONTAIN AMBIGUOUS, CONTRADICTORY, CONFLICTING OR INCONSISTENT PROVISIONS, EFFECT WILL BE GIVEN TO THE PROVISIONS MOST FAVORABLE TO THE ASSURED, AND THAT CONSTRUCTION WILL BE ADOPTED WHICH IS MOST FAVORABLE TO THE ASSURED.

National Bank v. *Ins. Co.*, 95 U. S., 673.

Grace v. *American Central Ins. Co.*, 109 U. S., 278.

Moulor v. *American Life Ins. Co.* 111 U. S., 335.

American Surety Co. v. *Pauly*, 170 U. S., 133.

Trav. Ins. Co. v. *McConkey*, 127 U. S., 661, 666.

Thompson v. *Phenix Ins. Co.*, 136 U. S., 287, 297.

Imperial Ins. Co. v. *Cass County*, 151 U. S., 452, 462.

Indemnity Co. v. *Dorgan*, 16 U. S., App. 290, 309; 7 C. C. A., 581; 58 Fed. Rep., 945.

Insurance Co. v. *Randolph*, 24 C. C. A., 305; 78 Fed. Rep., 754, 761, 762.

Kister v. *Insurance Co.*, 128 Pa. St., 553.

Under rules of proper construction, these policies should be construed to grant thirteen full months of insurance for the first annual premium. This argument is elaborated by Judge Shiras (pp. 35-52), and we adopt his reasoning.

The month of grace (p. 9; par. 2, p. 20) is an admitted extra month that went to make up the thirteen months of insurance, so we may lay aside that month as a benefit secured and conceded.

The agreements in controversy should admit of a construction that would grant a full year's insurance for the first annual premium, plus an additional month of grace, regardless of the question of future insurance. The month of grace is always to be considered as an indulgence, as a gratuity (p. 20). It is admitted that the company was paid and retains the purchase price of thirteen months' insurance, and if this judgment shall stand by the grace of the parol evidence rule the fraud of the agent will cheat the assured out of fourteen days. The forfeiting provisions should be construed as effecting the right to renewals, that is, as affecting a continuation of the policies in force in subsequent years, and not as a limitation upon the time for which the premium had already been paid. Having paid for thirteen months of insurance the assured should not be subjected to a forfeiture which in effect "would result in the forfeiture of a portion of the premium already paid."

Methvin v. *Fid. Life Ass'n.* 58 Pac. Rep., 387.
Ins. Co. v. *Norton*, 96 U. S., 234.
Ins. Co. v. *Eggleston*, 96 U. S., 572.
Thompson v. *Ins. Co.*, 104 U. S., 252.
Ins. Co. v. *Doster*, 106 U. S., 30.
Ins. Co. v. *Russell*, 144 U. S., 439.

XIV.

THE CONTROVERTED PROVISIONS OF THE POLICIES ARE DIFFICULT OF INTERPRETATION, UNCERTAIN AND AMBIGUOUS.

Upon this proposition, we would ask the Court to carefully consider the cases cited by Judge Caldwell, and especially *N. Y. Life Ins. Co.* v. *Dingley*, 93 Fed. Rep., 153, and *Rosenplanter* v. *Providence Sav. Life Assr. Soc.*, 96 Fed. Rep., 721, in which the Circuit Court of Appeals of the Ninth and Sixth Circuits show the difficulty of interpretation under the New York statute relating to forfeitures. The *Dingley* case sets out the New York statute and also sets out a notice doubtlessly prepared and used in hundreds of thousands of cases by the respondent herein, and holds the notice fatally defective. The same kind of a notice was given in this case.

The fact is disclosed by the *Dingley* case, and, indeed, by all the cases cited by Judge Caldwell from New York State and the Federal Courts, that the respondent company itself has never been able to prepare a form of notice under the New York statute and its form of policy sufficient to work a forfeiture for nonpayment.

This would seem to be sufficient proof of the difficulty of interpretation and the uncertainty and ambiguity of the provisions of the agreements in controversy to warrant this Court in saying, as was said in *Fidelity & Casualty Co.* v. *Lowenstein*, 97 Fed. Rep., 20, that there is created "a doubt as to its proper interpretation of sufficient gravity to be resolved in favor of the insured."

Not only is the counter-proposition (the policy) a part of the same agreement as the application (proposition), between which there is a loss to the assured of fourteen days' insurance as conceded by Judge Sanborn, but the application contains the provision (p. 12), "that any policy which may be issued under this application shall *not* be in force until the pay-

ment to and acceptance of the premium by said company," with which should be considered the 7th finding, as follows, to-wit: "By the express understanding had between F. W. Smith, the agent of the New York Life Insurance Company, and Frank E. McMaster, when the application for insurance was signed, it was agreed that the first year's premium was to be paid by McMaster upon the delivery to him of the policies, and that the contract of insurance was not to take effect until the policies were delivered;" and also the falsified interpolation, "please date policy same as application," the controlling effect of which is conceded in the defendant's answer (par. 2, p. 20), in the following words, to-wit: "Said application also contained a request that said five policies each should be issued, dated and take effect the same date as the application, namely, the 12th day of December, 1893, and said request was complied with, and the policies were so issued," which likewise involves a proposition and counter-proposition to the extent of fourteen days' variation in the time when the insurance went into effect. Provisions thus diametrically opposed to each other would seem to make manifest the inconsistency and ambiguity of the insurance contract, and to furnish the basis for a rule of construction permitting a recovery.

The masterly opinion of Judge Shiras on this proposition, construing the terms of the policies, *as granting thirteen full months of insurance upon their face*, should at least create a doubt as to the difficulty of construction of sufficient gravity to warrant a Court in resolving the question of interpretation in favor of the insured.

XV.

NO INTENT TO DECEIVE OR MISLEAD IS NECESSARY.

Judge Thayer in his concurring opinion assumes that the representations of the agent to be material had to be made with intent to deceive or mislead. But neither a fraudulent

purpose nor an intent to deceive or mislead is essential to the application of the doctrine of estoppel.

Leather Man. Nat'l Bank v. *Morgan*, 117 U. S., 96.
Dickerson v. *Colgrove*, 100 U. S., 580.
2 Pomeroy, Eq. Jur., §805.
Dair v. *United States*, 16 Wall., 1-4.

See also the petition for rehearing, record, pp. 113-17.

"Fraud or bad faith is not a requisite of estoppel."
Ewart on Estoppel, p. 97.

It is always enough if the conduct or representations naturally result in accomplishing a legal fraud.

"It has long been held that where it is a breach of good faith to allow the truth to be shown, there an admission will estop."

Bank v. *Morgan*, 117 U. S., 96.

The doctrine of equitable estoppel may be applied in a law action.

Barnard v. *German Seminary*, 49 Mich., 444.
Kirk v. *Hamilton*, 102 U. S., 777.
John Shilleto Co. v. *McClung*, 45 Fed., 778.
Ins. Co. v. *Wilkinson*, 13 Wall., 222.

XVI.

SMITH WAS THE AGENT OF THE COMPANY. X

The Iowa statute, Sec. 1749, Code of '97 (set out in appendix hereto), contains an old provision that "any person who shall hereafter solicit insurance, or procure application therefor, shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application, or on a renewal thereof, anything in the application, policy or contract to the contrary notwithstanding." The

X The findings (3rd, 6th, 7th, 8th, 9th, pp. 32-3) are conclusive that Smith was the agent of the company. No limitation is stated.

following authorities hold that this statute applies to cases like this:

Jamison v. *Ins. Co.*, 85 Iowa, 229.
Cook v. *Association*, 74 Iowa, 746.
Assurance Soc., v. *Clements*, 140 U. S., 226.
Indemnity Company v. *Berry*, 1 C. C. A., 561.
Cont. Ins. Co., v. *Chamberlain*, 132 U. S., 394.
N. Y. Life Ins. Co., v. *Russell*, 77 Fed. Rep., 94.
Washington Bank v. *Hume*, 128 U. S., 195, 206.
Joyce on Insurance, Sec. 194.

While we elsewhere, under the pleadings and the facts peculiar to this case, contend that, in the absence of any conflicting Iowa statute or forbidding public policy, the New York statute applies and controls on the question of forfeiture, we are not inconsistent in also contending that no matter what the agreement of the parties may be on the agency question, and especially where, as in this case, neither the agreements nor issues assume the contrary, the agent Smith, by virtue of the Iowa statute and the facts, was the exclusive agent of the respondent. Indeed, the answer seems to clothe the agent with authority to actually insure (par. 2, p. 2).

XVII.

THE SPECIAL FINDING AS TO NOTICE IS INSUFFICIENT TO WARRANT THE JUDGMENT OR TO SUSTAIN THE SAME ON APPEAL.

The special findings of the Circuit Court must be accepted as conclusive in this Court, and the only question for this Court to consider is whether they sustain the judgment.

The failure of the Circuit Court to find an essential fact, or the insufficient or imperfect finding of any fact essential to support the judgment, is fatal to the judgment.

A statement of the legal effect of a document not in the record, nor made a part of the findings, nor its contents anywhere set out or disclosed, is not a finding of fact, but a mere conclusion of law, and is of no force.

The respondent sought to forfeit the policies by giving a notice in deference to the New York statute of forfeiture.

The application declares this insurance contract to be a New York contract (p. 12). The policies refer expressly to this New York statute as Chapter 690, Laws of 1892, of the State of New York (p. 10), and they are made payable, in case of loss, in New York State (p. 6), and were there advised, issued and dated, and there proofs of death were to be made (pp. 6, 9). New York is the place of performance. The application is expressly made a part of the policies (div. 5, p. 12), and it is expressly provided therein "that the contract contained in said policy and in this application shall be construed according to the laws of the State of New York, *the place of said contract being agreed to be the home office of said company in the City of New York*" (p. 12). Moreover, the answer expressly alleges compliance with a New York statute (par. 4, p. 20; finding 10, p. 35).

Ins. Co. v. Chew, 21 Sup. Ct. Rep. 106

In its brief before the Court of Appeals, the respondent said: "We alleged in our answer the sending of the kind of notice required by the statutes of New York. * * * No one would certainly contend that the notice plead and proved was not the notice required by the statutes of New York." There is no conflicting Iowa statute relating to notice, and no forbidding public policy is violated by adopting the agreement of the parties that the New York statute of forfeiture shall apply.

This New York statute is set out in full in the opinion of Judge Caldwell (pp. 99-100), and in the Appendix hereto.

The burden of proof to show that a legal and sufficient notice was properly given rests upon the insurance company.

It must show a strict compliance with the terms of the statute before it can assert a forfeiture. The requirements of this statute, and each of them, are rigidly enforced under plain, definite and exacting decisions of the Court of Appeals of the State of New York, which decisions are binding on the Federal Courts.

Baxter v. *Insurance Co.*, 119 N. Y., 454, holds that:

"This statute was a part of the contract in question, and governs the rights and liabilities of the parties in precisely the same way and to the same extent as if all its terms and conditions had been actually incorporated into the policy."

See also,

Defreece v. *Insurance Co.*, 136 N. Y., 151

Phelan v. *Insurance Co.*, 133 N. Y., 147.

Griffith v. *Insurance Co.*, 101 Cal., 627.

Johnson v. *Ins. Co.*, 109 Iowa, 711.

N. Y. Life Ins. Co., v. *Dingley*, (C. C. A., 9th Circuit), 93 Fed. Rep., 153.

Rosenplanter v. *Prov. Sav. Life Assr. Soc.* (C. C. A., 6th Circuit), 96 Fed. Rep., 721.

Mutual Ins. Co. v. *Hill*, 97 Fed Rep., 263.

Mutual Ins. Co. v. *Dingley*, 100 Fed. Rep., 408.

The only finding of fact on the question of notice reads as follows:

"10th. That not later than November 17th, 1894, notice was sent to Frank E. McMaster of the coming due of the premiums on the policies issued to him by the defendant company, in accordance with the requirements of the statutes of the State of New York" (p. 34).

There is an utter failure to find any of the requisite facts showing a compliance with the New York statute by the company.

The New York statute requires that the notice shall be mailed "at least fifteen and not more than forty-five days prior to the day when the same (premium) is payable." The general statement that a notice was sent "*not later than November 17*,

189½," is not the finding of an ultimate fact. It is not a finding that the notice was not sent more than forty-five days prior to the day when the premium was payable, in which event the statute would make the notice void. The notice might well have been sent sixty days prior thereto, and still the finding would be absolutely true; yet the plain requirements of the statute would not be satisfied.

The statute requires that the notice "shall be duly addressed and mailed to the person whose life is insured;" but for anything that appears the notice may have been sent to Alaska, unaddressed, by a private messenger.

There is no finding that the letter was properly addressed or mailed to the assured "at his last known postoffice address, postage paid."

The finding does not show, as the statute requires, that a written or printed notice was given stating the amount of the premium due on the policies; the place where and the person to whom the premium should be paid; nor that the notice was sent to the assured properly addressed, prepaid and mailed within the period of time required by the statute; nor that a notice was sent notifying the assured when the premium would become due and payable; nor that unless the premium was paid the policies and all payments thereon would become forfeited and void as provided by the statute.

The only finding that even attempts to satisfy the requirements of the New York statute is the latter part of this 10th finding: that a notice was sent "in accordance with the requirements of the statutes of the State of New York." But this clause must be construed in reference to and limited by the finding itself that the notice was "of the coming due of the premium on the policies" in controversy, and such a restricted notice is wholly insufficient and fatal, for it omits a dozen other equally essential requisites, even if sent "in accordance with the requirements of the statutes of New York," as to this one particular. In assuming to specifically state one

of the terms of the notice, the finding should be held to exclude all the others not mentioned. If the finding should be held to refer to the notice set out in the answer (p. 20, par. 4), then the notice given was fatally defective.

Inasmuch as none of the essential contents of the notice are found, nor anywhere given, the last clause of the 10th finding is without force or effect to sustain the judgment, because it states a mere conclusion of law, and not the finding of an ultimate fact. The general statement that a notice was sent "of the coming due of the premiums" at some unstated time does not sufficiently state the ultimate fact.

U. S. v. *Harris*, 77 Fed. Rep., 825.
Cooper v. *French*, 52 Ia., 531.
12 Ency. Pl. & Pr., 1038-1046.
Daube v. *Phil. Ry. Co.* 77 Fed. Rep., 715-16.
Keene Mach. Co. v. *Barratt*, 100 Fed. Rep., 590,593.

"Findings of fact which merely announce certain legal conclusions deducible from facts not stated are not sufficient to support a judgment."

8 Ency. Pl. & Pr., 943.
Kane v. *Rippey*, 22 Ore., 299.

The burden of proving a strict compliance with all the essential requirements of the statute being upon the company, and the special findings being silent as to every essential fact of notice, the Court is bound to infer an insufficient notice, for nothing can be supplied to such findings by intendment. Every fact essential to support the judgment must affirmatively appear in the findings.

U. S. v. *Harris*, 77 Fed. Rep., 812, 825.

An insufficient finding upon any material issue or fact has the same legal effect as no finding at all, and, therefore, is equivalent to an express finding against the party on whom the burden of proof rests, which in this case was the company.

"It must be remembered, however, that silence in a special verdict or finding upon any issue or question of fact is equivalent

to an express finding thereon against the party on whom was the burden of proof."

Keene Mach. Co. v. *Barratt*, 100 Fed. Rep., 590, 593.

See also opinion of Judge Caldwell (pp. 99-101) on this proposition.

XVIII.

THIS COURT SHOULD ORDER JUDGMENT TO BE ENTERED IN FAVOR OF THE PETITIONER.

The special findings of the Circuit Court are such (18th finding, p. 35) that this Court should reverse both the Circuit Court of Appeals and the Circuit Court, and remand the case with suitable instructions to enter judgment in favor of the petitioner and against the respondent for the sum of $5,965, together with interest thereon from November 1, 1898, and for costs in all the Courts.

Scott v. *Hickman*, 112 U. S., 150.
Allen v. *St. Louis Bank*, 120 U. S., 20, 40.
Evans v. *Kister*, 92 Fed. Rep., 828, 833.

Respectfully submitted,

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F. E. GILL,
E. A. BURGESS,
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Sioux City, Iowa,
Of Counsel for Petitioner.

APPENDIX.

IOWA STATUTE.

Chapter 211, Laws of 18th G. A. of Iowa, provides:

"Section 1. Any person who shall hereafter solicit insurance, or procure applications therefor, shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application, or on a renewal thereof, anything in the application or policy to the contrary notwithstanding.

"Section 2. All insurance companies or associations shall, upon the issue or renewal of any policy, attach to such policy, or indorse thereon, a true copy of any application or representations of the assured, which, by the terms of such policy, are made a part thereof, or of the contract of insurance, or referred to therein, or which may in any manner affect the validity of such policy. The omission so to do shall not render the policy invalid, but if any company or association neglects to comply with the requirements of this section, it shall forever be precluded from pleading, alleging, or proving such application or representations, or any part thereof, or falsity thereof, or any parts thereof, in any action upon such policy; and the plaintiff in any such action shall not be required, in order to recover against such company or association, either to plead or prove such application or representations, but may do so at his option.

* * * * * *

"All the provisions of this chapter shall apply to and govern all contracts and policies of insurance contemplated in this chapter, anything in the policy or contract to the contrary notwithstanding."

See *Ins. Co.* v. *Chamberlain*, 132 U. S., 304; also 1897 Iowa Code, sections 1749, 1750, 1815 and 1819, covering same subject.

NEW YORK STATUTE OF NOTICE.

"No Forfeiture of Policy Without Notice. No life corporation doing business in this state shall declare forfeited or

lapsed any policy hereafter issued or renewed, and not issued upon the payment of monthly or weekly premiums, or unless the same is a term insurance contract for one year or less, nor shall any such policy be forfeited or lapsed by reason of nonpayment, when due, of any premium, interest, or installment or any portion thereof, required by the terms of the policy to be paid, unless a written or printed notice stating the amount of such premium, interest, installment, or portion due thereof on such policy, the place where it should be paid, and the person to whom the same is payable, shall be duly addressed and mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, at his or her last known postoffice address, postage paid by the corporation, or by an officer thereof, or person appointed by it to collect such premium, at least fifteen, and not more than forty-five, days prior to the day when the same is payable. The notice shall also state that unless such premium, interest, installment or portion thereof, then due, shall be paid to the corporation, or to a duly appointed agent or person authorized to collect such premium, by or before the day it falls due, the policy, and all payments thereon, will become forfeited and void, except as to the right to a surrender value, or paid-up policy, as in this chapter provided. If the payment demanded by such notice shall be made within the time limited therefor, it shall be taken to be in full compliance with the requirements of the policy in respect to the time of such payment; and no such policy shall in any case be forfeited or declared forfeited or lapsed until the expiration of thirty days after the mailing of such notice. The affidavit of any officer, clerk, or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given." Laws 1892, c. 690, art. I., par. 92.